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TRANSCRIPT OF RECORD

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U. S. S. C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN, PETITIONER,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED APRIL 9, 1937.

CERTIORARI GRANTED MAY 17, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN, PETITIONER,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

INDEX.

	Original	Print
Proceedings in Supreme Court of Pennsylvania	1	1
Petition for writ of habeas corpus	1	1
Docket entries of Court of Quarter Sessions of Erie County	5	3
Sentence of Court of Quarter Sessions of Erie County	7	4
Record from Court of Quarter Sessions of the Peace of Centre County	8	4
Information	8	4
Indictment	10	7
Sentence	11	8
Excerpts from petitioner's brief	12	9
Docket entries	30	21
Opinion, Stern, J.	31	22
Clerk's certificate	37	27
Order allowing certiorari	39	27

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

COMMONWEALTH ex Rel. ELMER SULLIVAN

vs.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the Judges of the State Supreme Court:

The petitioner, Elmer Sullivan, respectfully represents that he is a citizen of the State of Pennsylvania, and of these United States, and he is of legal age, and that he believes he is being illegally restrained of his liberty for reasons set forth herein:

First. Your petitioner on the 26th day of April, 1929, entered a plea of guilty in the Court of Quarter Sessions of Erie County, Pennsylvania, at No. 25 May Sessions, 1929 to the following charge:

1st Count. Breaking and entering store building with intent to commit a felony therein;

2nd Count. Larceny.

He was sentenced by Judge William E. Hirt as follows:

"Sentenced to Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three Years and the Maximum Six Years, and thereby to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with."

Your petitioner was forthwith committed to the Western Penitentiary of Pennsylvania to serve said sentence. Copy of said indictment and sentence of the court is attached hereto and made a part of this petition.

Second. Subsequently on the 7th day of February, 1930, your petitioner was transferred to the Prison Farm, known

as Rockview, situate in Centre County, State of Pennsyl-
[fol. 2] vania. On the 28th day of December, 1931, your said petitioner escaped from said Prison Farm, known as Rockview, situate in Centre County, State of Pennsylvania, and shortly thereafter was apprehended.

Third. On the 28th day of December, 1931, your said petitioner was indicted by the Court of Quarter Sessions of the Peace in and for the County of Centre as follows:

"The said Elmer Sullivan did wilfully, unlawfully and maliciously break out of said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania."

On the 31st day of December, 1931, your petitioner was sentenced by Judge M. Ward Fleming, of the Court of Centre County, Pennsylvania, on the said charge of breaking out of prison as follows:

"To pay the cost of prosecution, a fine of $1.00 and undergo imprisonment in the Western Penitentiary, State of Pennsylvania, for a period not less than three years, nor more than six years, to be computed from the expiration of your original sentence from Erie County and that you stand committed until such sentence is complied with."

Your petitioner was forthwith committed to the said Western Penitentiary in compliance with the above sentence. A certified copy of the information, transcript, indictment and sentence of the said Court of Centre County, Pennsylvania, being attached hereto and made a part of this petition.

Fourth. Your petitioner therefore sets forth that he is at the present time confined in the Western Penitentiary of Pennsylvania, situate in Allegheny County, Pennsylvania, and that he is confined there illegally and by virtue of said illegal confinement, is restrained of his liberty contrary to law.

Wherefore, your petitioner prays your Honorable Court
[fol. 3] to issue a writ of habeas corpus for his relief agreeable to the Act of Assembly, 18th of February, 1785, for

the reason that he is being illegally restrained of his liberty in violation of law.

(S.) Elmer Sullivan.

[fol. 4] *Duly sworn to by Elmer Sullivan. Jurat omitted in printing.*

[fol. 5] IN THE COURT OF QUARTER SESSIONS, MAY SESSIONS, 1929

No. 25

COMMONWEALTH

vs.

ELMER SULLIVAN et al.

DOCKET ENTRIES

Charge: 1st Ct.—Breaking and Entering a Store Building with Intent to Commit a Felony Therein.
2nd Ct.—Larceny.
3rd Ct.—Receiving Stolen Goods.

And now, to-wit: April 26, 1929, the Defendants being arraigned, plead guilty to 1st and 2nd Counts, before,

William E. Hirt, Judge.

April 26th, 1929, And now, the Court sentence the defendant, Elmer Sullivan, to pay a fine of One Hundred Dollars to the Commonwealth, (for the use of the County of Erie), pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in the Western Penitentiary, of Pennsylvania, (situate in the County of Allegheny), by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three Years, and the maximum Six Years, there to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with.

Per Curiam, H.

[fol. 6] Clerk's certificate to foregoing paper omitted in printing.

[fol. 7] IN THE COURT OF QUARTER SESSIONS OF ERIE COUNTY

[Title omitted]

SENTENCE:

Indictment 1st Ct.—Breaking and Entering a Store Building with Intent to Commit a Felony Therein.
2nd Ct.—Larceny.
3rd Ct.—Receiving Stolen Goods.
April 26, 1929. Defendant pleads Guilty.

And now, April 26th, 1929, the Court sentence the Defendant, Elmer Sullivan, to pay a fine of One Hundred ($100) Dollars to the Commonwealth (for the use of Erie County) pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof and undergo an imprisonment in the Western Penitentiary, of Pennsylvania (situate in the county of Allegheny,) by separate or solitary confinement at labor for an indefinite term, the minimum of which shall be Three (3) Years and the maximum Six (6) Years to be computed from this date, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

Per Curiam, H.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 8] IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF CENTRE COUNTY, PENNSYLVANIA, FEB. SESSIONS 1932

No. 100

COMMONWEALTH

vs.

ELMER SULLIVAN

INFORMATION—Filed December 31, 1931

Commonwealth of Pennsylvania vs. Elmer Sullivan. Reg. No. B-1417. T. N. Elmer John Sullivan

STATE OF PENNSYLVANIA,
County of Centre:

Before me, the subscriber, a Justice of the Peace in and for said State and County, personally came W. J. McFar-

land, Deputy Warden, who being sworn according to law, says that Elmer Sullivan, Reg. No. B-1417, a prisoner confined in the Western State Penitentiary, in the Township of Benner, County of Centre, and State of Pennsylvania, sentenced by the Court of Quarter Sessions of the Peace for Erie County on the 26th day of April, A. D. 1929, to a term of Imprisonment of not less than 3 years nor more than 6 years, and whose term of imprisonment had not yet expired, did, on the 28th day of December, A. D. 1931, in the Township of Benner, County of Centre and State of Pennsylvania, break prison and break prison and escape from the said Western State Penitentiary, contrary to the Acts of the General Assembly made and provided for.

(Signed) W. J. McFarland, Deputy Warden.

Sworn and subscribed before me this 28th day of December, A. D. 1931. (Signed) Abram Houser, Justice of the Peace. My Commission expires first Monday Jan. 1934.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 9] Transcript.

Commonwealth of Pennsylvania

versus

Elmer Sullivan, Reg. No. B-1417 T. N. Elmer John Sullivan

Costs

Magistrate	$....
Information	50
Docket Entry	50
Warrant	50
Subpœna	....
Examination	75
Oaths	25
Recognizance of Defendant	....
" Pros. and Wit.	....
2 Commitments	1.00
Discharge	50
Continuance	....
Transcript and Cert.	75
	....
	$4.00

Costs—Continued

Constable	....
Sheriff Dunlap	2.00
Execution and Warrant	....
Mileage—Miles Circuit	....
On Com. Sub.	....
On Commitment	....
Transcript	....
	....
	$....

Warrant issued on the 28th day of December 1931, on oath of W. J. McFarland, Deputy Warden Defendant charged with breaking prison and breaking prison and escaping from the Western State Penitentiary of Pennsylvania, in the Township of Benner, County of Centre, and State of Pennsylvania, on the 28th day of December A. D. 1931.

December 30, 1931, Defendant arrested and taken to the Centre County jail, and then later brought before me for a hearing; wherefore defendant waived further hearing and admitted guilt as charged.

After hearing, defendant required to give bail in the sum of $—, conditioned for appearance at next term of Court.

Defendant —— ——, residing at ——, and —— ——, residing at ——.

Each held in the sum of $—, conditioned that the Defendant will appear at the next Court of Quarter Sessions of the Peace for —— County, and not depart said Court without leave.

The following persons are witnesses for the Commonwealth:

1	6 ....
2	7 ....
3	8 ....
4	9 ....
5	10 ....

* Each of whom are bound in the sum of — for their appearance respectively, at the next Court of Quarter Ses-

* Only used in cases of felony.

sions for the County of —— and give evidence on the part of the Commonwealth, and not depart said Court without leave.

I hereby certify that the above is a correct transcript from my docket. Witness my hand and seal this 31st day of December A. D. 1931.

(Signed) Abram Houser, Justice of the Peace. My Commission expires first Monday January 1934. (Seal.)

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 10] IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF CENTRE

INDICTMENT—Filed December 31, 1931

COUNTY OF CENTRE, SS:

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring in and for the county of Centre, upon their respective oaths and affirmations do present that one Elmer Sullivan, late of the County aforesaid, was for some time prior to the day of December 28, in the year of our Lord One Thousand Nine Hundred and thirty-one, lawfully committed and confined as a prisoner in the Western Penitentiary of Pennsylvania, and that on or about the 28th day of December, A. D. 1931, at the County aforesaid and within the jurisdiction of this Court, with force and arms, etc., the said Elmer Sullivan did wilfully, unlawfully and maliciously break out of the said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest Aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that the said Elmer Sullivan, late of the County aforesaid, was for sometime prior to the 28th day of December A. D. 1931, lawfully committed and confined as a prisoner in the said Western Penitentiary, and that on or about the 28th day of December, A. D. 1931, at the County

aforesaid, and within the jurisdiction of this Court, with force and arms, etc., the said Elmer Sullivan did wilfully, unlawfully and maliciously escape from the said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grant Inquest Aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that the said Elmer Sullivan, late of the County aforesaid, was for some time prior to the 28th day of December A. D. 1931, lawfully committed and confined as a prisoner in the Western Penitentiary of Pennsylvania, and that on or about the 28th day of December, A. D. 1931, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, etc., the said Elmer Sullivan did wilfully, unlawfully and maliciously break out of and escape from the said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

(Signed) John G. Love, District Attorney.

And now December 31, 1931 I hereby waive the finding of a true bill by the Grand Jury on the within indictment and enter a plea of guilty thereto, as if regularly tried and convicted as within indicted.

(Signed) Elmer Sullivan.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 11] IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF CENTRE COUNTY, PENNSYLVANIA

[Title omitted]

SENTENCE

And now, December 31st, 1931, the sentence of the Court is that you, Elmer Sullivan, pay the costs of prosecution, a fine of One Dollar ($1.00), and undergo imprisonment in

the Western Penitentiary of the State of Pennsylvania for a period of not less than three years nor more than six years, to be computed from the expiration of your original sentence from Erie County, and that you stand committed until such sentence is complied with.

By the Court.

(Signed) M. Ward Fleming, P. J.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 12] IN SUPREME COURT OF PENNSYLVANIA

EXCERPTS FROM PETITIONER'S BRIEF

2. Statistics and Certified Record of Lower Court

Copy

IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF CENTRE COUNTY, PENNSYLVANIA, FEBRUARY SESSIONS, 1932

No. 99

COMMONWEALTH OF PENNSYLVANIA

vs.

CLARENCE McCANN, Reg. No. B-2151, T. N. Clarence Lloyd McCann

Attorney for Plaintiff: —— ——.
Attorney for Defendant: —— ——.

Information

STATE OF PENNSYLVANIA,
County of Centre:

Before me, the subscriber a Justice of the Peace in the aforesaid State and County, personally came W. J. McFarland, Deputy Warden, who being sworn according to law, says that Clarence McCann, Rg. No. B-2851 a prisoner confined in the Western State Penitentiary of Pennsylvania in the Township of Benner, County of Centre and State of [fol. 13] Pennsylvania, sentenced by the Court of Quarter Sessions of the Peace for Fayette County, sentenced on the

11th day of September A. D. 1931 to a term of imprisonment of not less than one year nor more than two years, and whose term of imprisonment had not yet expired, did on the 28th day of December A. D. 1931, in the Township of Benner, County of Centre, and State of Pennsylvania, break prison, and break prison and escape from the said Western State Penitentiary, contrary to the Acts of the General Assembly in such cases made and provided.

(Signed) W. J. McFarland, Deputy Warden.

Sworn and subscribed before me this 28th day of December A. D. 1931. (Signed) Abram Houser, Justice of the Peace. (Seal.)

Certified from the record as entered and filed in this office. In testimony whereof, I hereunto set my hand and cause the seal of the Court to be affixed this 13th day of October, A. D. 1936.

(Signed) Bond C. White, Clerk of the Court. (Seal.)

COMMONWEALTH OF PENNSYLVANIA

versus

CLARENCE McCANN, Reg. No. 2851, T. N. Clarence Lloyd McCann

[fol. 14]

Costs

Information	$.50
Docket Entry	.50
Warrant	.50
Examination	.75
Oaths	.20
Commitment	1.00
Discharge	.50
Transcript & certificate	.75
	4.70

Constable
Sheriff

Transcript

Warrant issued on the 28th day of December 1932, on oath of W. J. McFarland, Deputy Warden Defendant charged with Breaking Prison, breaking prison and escap-

ing from the Western State Penitentiary of Pennsylvania, on the 28th day of December A. D. 1931, in the Township of Benner, County of Centre and State of Pennsylvania.

December 30, defendant arrested and taken to the Centre County jail, and then brought before me for a hearing, wherefore defendant waived further hearing and admitted his guilt as charged.

Certified from the record as entered and filed in this office. In testimony whereof, I set my hand and cause the seal of the Court to be affixed this 12th day of October 1936.

(Signed) Bond C. White, Clerk. (Seal.)

[fol. 15] IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF CENTRE, FEBRUARY SESSIONS, 1932

No. 99

COUNTY OF CENTRE, SS:

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring in and for the County of Centre, upon their respective oaths and affirmations do present that one Clarence McCann, late of the County aforesaid, was for some time prior to the day — in the year of our Lord One thousand nine hundred and thirty-one, lawfully committed and confined as a prisoner in the Western Penitentiary of Pennsylvania, and that on or about the 28th day of December A. D. 1931, at the County aforesaid and within the jurisdiction of this Court, with force and arms, etc., the said Clarence McCann did wilfully, unlawfully and maliciously break out of the said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest Aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that the said Clarence McCann, late of the County aforesaid, was for some time prior to the 28th day [fol. 16] of December A. D. 1931, lawfully committed and confined as a prisoner in the said Western Penitentiary, and that on or about the 28th day of December A. D. 1931, at the County aforesaid, and within the jurisdiction of this Court with force and arms, etc., the said Clarence McCann did wilfully, unlawfully and maliciously escape from the

said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest Aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that the said Clarence McCann, late of the County aforesaid, was for some time prior to the 28th day of December A. D. 1931, lawfully committed and confined as a prisoner in the Western Penitentiary of Pennsylvania, and that on or about the 28th day of December A. D. 1931, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, etc., the said Clarence McCann did wilfully, unlawfully and maliciously break out of and escape from the said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

(Signed) John G. Love, District Attorney.

[fol. 17] Certified from the record as entered and filed in this office. In testimony whereof, I hereunto set my hand and cause the seal of the Court to be affixed this 12th day of October, 1936.

(Signed) Bond C. White, Clerk. (Seal.)

IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF CENTRE COUNTY, PENNSYLVANIA, FEBRUARY SESSIONS, 1932

No. 99

COMMONWEALTH

vs.

CLARENCE McCANN

Breaking and Escaping Pen. Pros. W. J. McFarland, Dep. Warden

Dec. 31, 1931. Defendant appears in open Court, waives finding of True Bill, enters plea of guilty on indictment filed.

Order of Sentence

And now, December 31, 1931, the sentence of the Court is that you, Clarence McCann, pay the costs of prosecution,

a fine of ($1.00) One Dollar, and undergo imprisonment in the Western Penitentiary of the State of Pennsylvania for a period of not less than one year nor more than two years, to be computed from the expiration of your original sentence from Fayette County, and that you stand committed until such sentence is complied with.

(Signed) By the Court, M. Ward Fleming, P. J.

[fol. 18] Jan. 2, 1932. Order of Sentence filed.

Jan. 5, 1932. Receipt from Western Penitentiary and Transportation bill of Sheriff filed.

Certified from the record as entered and filed in this office. In testimony whereof, I hereunto set my hand and cause the seal of the Court to be affixed this 13th day of October A. D. 1936.

(Signed) Bond C. White, Clerk of Court. (Seal.)

Report of Excerpts

On the resentencing of escaped prisoners from the Western State Penitentiary, Rockview Branch, as shown by the Quarter Sessions records in the Centre County Court at Bellefonte, Pennsylvania.

(Note) The sentence in full will be given under the first item, and thereafter the formal parts of the sentence will be omitted and only the length of the sentence and the place from which originally sentenced will be set forth.

Com.

vs.

Elmer Sullivan, Alias Elmer John Sullivan

100 February SS., 1932

Filed 12-31-31 B. & E. West Pen. Pros. McFarland, D. W. Ret. of J. P. filed. Committed.

12-31-31, defendant appears and waiving finding of true bill enters a plea of guilty on indictment filed.

[fol. 19] And now, 12-31-1931, the sentence—3 to 6 years on expiration of Erie County sentence.

1-2-32 order of sentence field.

1-5-32 rcpt. from West Pen. filed.

COM.

VS.

JOHN DESIMONE, Alias JOE TARVAIN

27 Nov. SS., 1932

Filed 9-26-32. B. & E. Pen. Pros. McFarland, D. W. Ret. of J. P. filed. Committed.

11-1-32 a true bill Josephine K. Dyer, Foreman.

11-16-32 defendant appears in open court and enters a plea of Not Guilty on indictment found, jury ordered, called and came 12 good and lawful citizens of Centre County who find the defendant guilty.

And now, 11-16-32 the sentence—3½ to 7 years on expiration of Erie County sentence.

10-18-32 order of sentence filed.

COM.

VS.

JACK W. LAWSON

94 Nov. SS., 1934

Filed 10-28-32. B. & E. Pen. Pros. McFarland, D. W. Not apprehended.

11-1-32 a true bill, Josephine K. Dyer, Foreman.

[fol. 20] 9-1-33 df. appears in open court and enters plea of guilty on indictment filed.

And now, 9-1-33 the sentence—5 to 10 years on expiration of Erie County Sentence.

9-5-33 order of sentence filed.

9-19-33 rcpt. fr. West. Pen. filed.

COM.

VS.

EDWARD WATSON

42 May SS., 1933

Filed 3-29-33. B. & E. Pen. Pros. McFarland, D. W. Ret. of J. P. filed. Committed.

5-3-33 a true bill, Morton Abelson, Foreman.

5-17-33 df. appears in open court and enters plea of guilty on indictment filed.

And now, 5-17-33, the sentence—4 years 7 months to 10 years on expiration of Erie County sentence.

5-22-33 order of sentence filed.

6-2-33 rcpt. fr. W. Pen. filed.

COM.

vs.

WALTER SCOTT

80 Sept. SS., 1933

Filed 7-12-33. B. & E. Pen. Pros. McFarland, D. W. Ret. of J. P. filed.

8-29-33 a true bill, W. G. Saxion, Foreman.

[fol. 21] 9-30-33 df. appears in open court and enters plea of guilty on indictment filed.

And now, 9-30-33, the sentence—6 to 12 years on expiration of Erie County sentence.

10-2-33 order of sentence filed.

10-4-33 rcpt. fr. W. Pen. filed.

COM.

vs.

RAY WHITE

20 Nov. SS., 1933

Filed 9-21-33. B. & E. Pen. Pros. McFarland, D. W. Ret. of J. P. filed Committed.

And now, 10-31-33 a true bill, N. I. Wilson, foreman.

11-13-33 df. appears and enters plea of not guilty, cause reached, &c., and find the df. guilty.

And now, 11-13-33, the sentence—3½ to 7 years on expiration of Erie Co. sentence.

11-15-33 order of sentence filed.

12-5-33 rcpt. fr. W. Pen. filed.

COM.

vs.

JOHN WESOLASKI

141 Sept. SS., 1934

Filed 8-17-34. B. & E. Pen. Pros. Rhoads, D. W. Ret. of J. P. filed.

8-29-34 a true bill, Chas. T. Sellers, Foreman.

[fol. 22] 8-5-35 df. appears in open court and enters a plea of guilty on indictment found.

And now, 8-5-35, the sentence—3 to 6 years on expiration of Erie County sentence.

8-5-35 order of sentence filed.

8-19-35 rcpt. fr. W. Pen. filed.

COMMONWEALTH OF PENNSYLVANIA,
County of Centre, ss:

Personally appeared M. W. Gettig, who being duly sworn according to law doth depose and say that he has made examination of the Quarter Sessions records of the Courts of Centre County for the past five years relative to the resentencing of escaped prisoners from the Western Penitentiary Rockview Branch, and that the record of which this is a part, is true and correct to the best of his knowledge and belief.

(Signed) M. W. Gettig.

Sworn to and subscribed before me this 27th day of October, A. D. 1936. (Signed) Bond C. White, Prothonotary. My commission expires First Monday in Jan. 1940. (Seal.)

STATE OF PENNSYLVANIA,
County of Erie, ss:

Before me, the subscriber, a Notary Public, in and for said State and County, personally appeared William W. [fol. 23] Knox, Attorney at Law, who being duly sworn according to law, deposes and says that he personally examined the records in the office of the Clerk of Courts of Erie County, Pennsylvania, and learned therefrom the duration of sentences imposed upon all persons sentenced by the Erie County Courts of Quarter Sessions and Oyer and Terminer, who later escaped from the prison farm at Rockview within the last five years; that he thereupon caused to be made an examination of the records in the office of the Clerk of Courts of Centre County by M. W. Gettig, a member of the bar residing in said county, and obtained from him an affidavit setting forth the sentences imposed on all convicts from Erie County escaping from said prison farm and sentenced during the last five years; and that in

every such case, the sentence imposed by the Centre County Court of Quarter Sessions was the same as the original sentence imposed by the Erie County Courts to be computed from the expiration of the original sentences.

(Signed) William W. Knox.

Sworn to and subscribed before me this 29 day of October, A. D. 1936. (Signed) Robt. J. Firman, Notary Public. My commission expires May 11, 1940. (Seal.)

[fol. 24] Excerpts Made by William W. Knox, Esq.

ERIE COUNTY COURT

COMMONWEALTH

VS.

JOHN DE SIMONE, Alias JOE TAVANI

Quarter Sessions Court

14 Sept. Sessions, 1929

Charge:

1. Breaking and entering a garage;
2. Larceny;
3. Receiving stolen goods.

October 1, 1929. Defendant pleads guilty on 1st and 2nd counts.

October 1, 1929. Court sentenced defendant * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 3 years and 6 months, and the maximum 7 years * * *

Per Curiam, H.

COMMONWEALTH

VS.

JACK W. LAWSON

Quarter Sessions Court

No. 140 Feb. Sessions, 1927

[fol. 25] Charge:

Breaking and entering a store building.

February 7, 1927. Defendant pleads guilty.

February 7, 1927. Court sentenced defendant to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 5 years and the maximum 10 years * * *

COMMONWEALTH

VS.

EDWARD WILSON, Alias ED. CONLEY et al.

Quarter Sessions Court

No. 102 Sept. Sessions, 1931

Charge:

Attempting to breaking and entering a warehouse.

September 8, 1931. A true bill.

September 14, 1931. Defendants plead not guilty, same day jury called.

September 15, 1931. Jury say they find defendants guilty as charged.

September 18, 1931. Court sentenced the defendant Edward Watson, alias Ed. Conley, to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 4 years and 7 calendar months, and the maximum 10 years.

[fol. 26] COMMONWEALTH

VS.

WALTER SCOTT

Oyer and Terminer Court

No. 1 February Sessions, 1931

February 2, 1931. A true bill.

February 17, 1931. Certified to Oyer and Terminer Court.

February 17, 1931. Prisoner pleads not guilty—jury impanelled.

February 20, 1931. Jury say they find the defendant guilty of voluntary manslaughter.

February 24, 1931. Rule for new trial granted.

February 27, 1931. Testimony filed.

February 28, 1931. Rule discharged.

February 28, 1931. Court sentenced the defendant, Walter Scott to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term the minimum of which shall be 6 years and the maximum 12 years.

COMMONWEALTH

VS.

RAY WHITE

Quarter Sessions Court

No. 84 February Sessions, 1929

Charge:

1. Larceny of Automobile.
2. Receiving stolen goods.

[fol. 27] February 4, 1929. Defendant pleads guilty to 1st count.

February 4, 1929. Court sentenced the defendant, Ray White, to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 3 years and 6 calendar months and the maximum seven years.

COMMONWEALTH

vs.

JOHN WESOLOSKI

Quarter Sessions Court

No. 66 February Sessions, 1934

Charge:

1. Breaking and entering a place of business;
2. Larceny;
3. Receiving stolen goods.

March 20, 1934. Defendant pleads guilty on 1st & 2nd counts.

May 20, 1934. Court sentenced defendant, John Wesoloski, to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 3 years and the maximum 6 years * * *

COMMONWEALTH

vs.

ELMER SULLIVAN et al.

[fol. 28] Quarter Sessions Court

No. 25 May Sessions, 1929

Charge:

1st. Breaking and entering a store building with intent to commit a felony therein.

2nd. Larceny.

3rd. Receiving stolen goods.

April 26, 1929. Defendant pleads guilty to 1st & 2nd counts.

April 26, 1929. Court sentenced defendant, Elmer Sullivan, to * * * undergo an imprisonment in the Western Penitentiary * * * for an indefinite term, the minimum of which shall be 3 years, and the maximum 6 years * * *

[fol. 32a] CERTIFICATE OF RECORD

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, Pier Dannals, Prothonotary of the Supreme Court of Pennsylvania, for the Western District thereof, do hereby certify that the foregoing record, pages 15a to 31a, both inclusive, is a true and faithful copy of a part of the brief in behalf of the petitioner for writ of habeas corpus, filed in the Supreme Court of Pennsylvania, in the Western District aforesaid, in a certain suit therein pending, wherein Commonwealth ex relationé Elmer Sullivan is plaintiff and Stanley Ashe, Warden, State Penitentiary, Western District of Pennsylvania, is defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of the said the Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this 8th day of April, in the year of our Lord one thousand nine hundred and thirty-seven.

Pier Dannals, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Western District.)

[fol. 33a] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

DOCKET ENTRIES

No. 908. Miscellaneous Docket

COMMONWEALTH, ex rel., ELMER SULLIVAN,

vs.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania

Attorney for Petitioner: Bernard T. Foley.
Attorney for Commonwealth: Adrian Bonnelly, Dep. Atty. General.
Sept. 21, 1936—Petition for writ of habeas corpus filed.

Order

September 21, 1936—Rule to show cause granted, returnable forthwith. The oral argument of the case is ordered

for the week of October 5, 1936, at Pittsburgh. The case to be placed at the foot of the list.

Per Curiam.

Sept. 22/36—Rule exit.

Oct. 2/36—Acceptance of service of rule dated October 1, 1936, filed.

October 7, 1936—Stipulation by counsel for continuance to November Session filed.

Order

And now, to wit, this 7th day of October, A. D. 1936, in accordance with the provisions of the stipulation in the above entitled matter, a continuance is hereby granted to the November Sessions.

Per Curiam.

October 7, 1936—Transferred to Philadelphia.

Nov. 23, 1936—Argued.

Decision

Jan. 11, 1937—The rule is discharged.

Stern, J.

[fol. 34a] In the Supreme Court of Pennsylvania, Western District

No. 908. Miscellaneous Docket

Petition for Writ of Habeas Corpus

Commonwealth, ex rel., Elmer Sullivan,

v.

Stanley Ashe, Warden, State Penitentiary, Western District of Pennsylvania

Opinion of the Court—Filed Jan. 11, 1937

Stern, J:

This is a petition for a writ of habeas corpus on which the court, exercising its original jurisdiction, has granted a rule to show cause. The petitioner, Elmer Sullivan, in 1929 pleaded guilty to breaking and entering with intent

to commit a felony, and was sentenced to the Western Penitentiary for a term of from three to six years. He was transferred to Rockview, from where he escaped in 1931. Being apprehended, he was indicted for breaking out of prison, pleaded guilty, and was sentenced to the penitentiary under the Act of March 31, 1860, P. L. 382, section 3, for a term of from three to six years, to be computed from the expiration of his original sentence.

The present writ is based upon the alleged unconstitutionality of the statute under which the sentence was imposed. The act provides, inter alia, that a prisoner breaking penitentiary or jail is guilty of a misdemeanor and upon conviction shall be sentenced to undergo an imprisonment to commence from the expiration of, and for a period of time not exceeding, the original sentence by virtue of which he had been imprisoned. The criticism leveled at the act is that for the offence of breaking prison unequal sentences are thus provided, depending upon what, it is contended, is the merely adventitious circumstance of the duration of [fol. 35a] a former sentence of the offender. It is claimed that this is a denial of the equal protection of the laws, and therefore a violation of section 1 of the fourteenth amendment of the Constitution of the United States. It is pointed out that in this very case the petitioner, Sullivan, made his escape from Rockview simultaneously with a fellow prisoner, Clarence McCann. The two were apprehended at the same time and sentenced on the same day, but McCann received a sentence of only one to two years because that was the extent of his original sentence.

The constitutional provision here invoked has been the subject of such a wealth of interpretation by the Federal Supreme Court that, at least as far as general underlying principles are concerned, there can be no room for misconception. The fourteenth amendment does not impose such a technical and legalistic uniformity upon all persons and human transactions as to preclude wise differentiations. Classifications are permissible when founded upon reason and logic; they are prohibited only when arbitrary and capricious. As was said by the present Chief Justice of the Supreme Court of the United States in Graham v. State of West Virginia, 224 U. S. 616, 630, quoting from an earlier case: "The Fourteenth Amendment is not to be considered 'as introducing a factitious equality without regard to prac-

tical differences that are best met by corresponding differences of treatment.' ''

The real question is whether a statute adopts an unreasonable classification when, in providing for the sentencing of persons who commit identical crimes, it authorizes the imposition of a severer sentence upon one who had previously offended more grievously than another. The answer would seem to be obvious. Probably every day, in every criminal court in the country, judges impose unequal sentences upon defendants who have committed the same offence but where their former records of crime are different. [fol. 36a] If judges are properly permitted to exercise such discretion, certainly the legislature by a general statute can enact into law the expression of a similar policy.

The classification effected by the act here under attack is justified. The longer the sentence which is being served by a prisoner the greater his temptation to seek to escape, and the greater therefore the penalty which must be imposed in order to act as an effective deterrent. Furthermore, the breaking from prison of one who is serving a long sentence, and therefore presumably has been guilty of a serious crime, involves a greater potential danger to society than the escape of a petty offender. Against a greater menace society is warranted in seeking a larger measure of protection.

The time has long passed in the development of penology when it was considered that a given punishment should automatically attach to a given crime. Penology is not, and probably never can become, an exact science. Sentencing criminals is a sociological problem, and as such demands a wide range of adaptation to social needs in the treatment of individual cases.

The most reliable guide to a judicial solution of the legal problem here presented is that offered by the decisions of the courts sustaining habitual criminal acts. In Graham v. State of West Virginia, 224 U. S. 616, 623, upholding such a statute, the Supreme Court of the United States said: "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased pun-

ishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been [fol. 37a] numerous acts of similar import in many States. This legislation has uniformly been sustained in the state courts, * * * and it has been held by this court not to be repugnant to the Federal Constitution." It was also said (p. 630) that "The fact of such [prior] sentence, indicating the gravity of the offense, affords a reasonable basis for classification."

In Moore v. Missouri, 159 U. S. 673, such a statute was attacked on the ground that it prescribed different punishment for different persons for committing the same offense. The Supreme Court pointed out that the punishment for the later offense was rendered more severe only in consequence of the defendant's previous conduct. The court said (p. 677): "Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, convicted as he had been, would be subjected to the like punishment. The Fourteenth Amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State. In re Converse, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. Pace v. Ala- [fol. 38a] bama, 106 U. S. 583; Leeper v. Texas, 139 U. S. 462."

An habitual criminal statute of Massachusetts was held constitutional in McDonald v. Massachusetts, 180 U. S. 311, of Wisconsin in Ingalls v. State of Wisconsin, 48 Wis. 647,

4 N. W. 785; of New York in People v. Sickles, 156 N. Y. 541, and of California in People v. Coleman, 145 Cal. 609, 79 Pac. 283. In the last named case it was said: "Penal laws are not so much for the punishment of the offender as for the protection of society, and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society."

Even where there are several participants in the commission of a single crime, it is not uncommon for a judge to impose unequal sentences based upon variations in age, sex, health, likelihood of reform, different degrees of initiative in the perpetration of the offense, and similar conditions.

In the present case the same crime, that of breaking prison, was committed by both Sullivan and McCann, but at the time Sullivan was serving a three to six year sentence whereas McCann was serving from one to two years; from this it must be presumed that Sullivan had committed either a graver crime than McCann or a similar offense under circumstances of greater culpability. The law was justified, therefore, when imposing sentence for the second crime, in treating Sullivan's offense more severely than that of McCann.

We hold that the Act of March 31, 1860, P. L. 382, section 3, does not deny the equal protection of the laws within the meaning of the fourteenth amendment. We cannot approve the conclusions to the contrary reached in State v. Lewin, 53 Kans. 679, 37 Pac. 168; In re Mallon, 16 Idaho 737, 102 Pac. 374, and State v. Johnsey, 46 Okla. Criminal Appeals 233, 287 Pac. 729.

[fol. 39a] Petitioner contends that inadvertently or ignorantly he pleaded guilty to the charge of breaking prison when really guilty of nothing more than an escape, which, he argues, is a lesser crime. Whatever the fact in that regard may be, redress does not lie within the scope of a habeas corpus; such a writ cannot be made the substitute for an appeal: Commonwealth v. Reifsteck, 271 Pa. 441, Halderman's Petition, 276 Pa. 1; Commonwealth v. Curry, 285 Pa. 289.

The rule is discharged.

[fol. 40a] CERTIFICATE OF RECORD

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, Pier Dannals, Prothonotary of the Supreme Court of Pennsylvania, for the Western District thereof, do hereby certify that the foregoing record, pages 1 to 18, inclusive, is a true and faithful copy of the record and proceedings of the Supreme Court of Pennsylvania, in the Western District afor-said, in a certain suit therein pending, wherein Commonwealth, ex rel. Elmer Sullivan, is plaintiff and Stanley Ashe, Warden, Western Penitentiary is defendant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said the Supreme Court of Pennsylvania, in and for the Western District, at Pittsburgh, this thirty-first day of March, in the year of our Lord one thousand nine hundred and thirty-seven.

Pier Dannals, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Western District.)

[fol. 41a] Endorsed on cover: In the Supreme Court of the State of Pennsylvania, Western District. No. 908, Miscellaneous Docket. Commonwealth, ex rel. Elmer Sullivan, vs. Stanley Ashe, Warden, State Penitentiary, Western District of Pennsylvania.

[fol. 39] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 17, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Pennsylvania is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,418. Pennsylvania Supreme Court. Term No. 25. Commonwealth of Pennsylvania, ex rel. Elmer Sullivan, petitioner, vs. Stanley Ashe, Warden State Penitentiary, Western District of Pennsylvania. Petition for a writ of certiorari and exhibit thereto. Filed April 9, 1937. Term No. 25, O. T., 1937.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF.

WM. E. LEAHY,
WM. J. HUGHES, JR.,
Shoreham Bldg., Washington, D. C.
BERNARD T. FOLEY,
Erie, Pa.,
Attorneys for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Question involved	1
Statement	3
Jurisdiction	5
Argument	5
Reasons relied upon for allowance of the writ	6
Brief in support of petition	9
Point I. The statute herein is violative of the due process and equal protection provisions of the Fourteenth Amendment and the decision below is in conflict with the decisions of the highest courts of other States with regard to similar statutes	9
Point II. Considering the instant case as one representative of a large group wherein the court below has uniformly imposed the maximum sentence under the act in question, has not the said act been applied in such manner as to deny due process of law and the equal protection of the laws?	9
Conclusion	22

Table of Cases Cited.

Barbier v. *Connelly*, 113 U. S. 27	13, 15
Com. ex rel. v. *Francies*, 73 Pa. Superior Ct. 385	21
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540	15
Graham v. *W. Va.*, 224 U. S. 616	20
Gulf, etc. R. Co. v. *Ellis*, 165 U. S. 150	15
Hurtado v. *California*, 110 U. S. 516	13, 15
Mallon, ex parte, 16 Idaho 737, 103 Pac. 374	2, 6, 10, 13
Marchant v. *Pa. R. Co.*, 153 U. S. 380	15
Missouri v. *Lewis*, 101 U. S. 22	20

Page

Santa Clara Co. v. *So. Pac. R. Co.*, 118 U. S. 394 15
State v. *Johnsey*, 287 Pac. 729, 46 Okla. Cr. App. 233 ..... 2, 6, 12
State v. *Lewin*, 53 Kans. 679, 37 Pac. 168 ..... 2, 6, 13

STATUTES CITED.

Act of Pennsylvania Assembly, March 31, 1860, P. L. 382, Sec. 3 ..... 1, 2, 9, 10
Constitution of the United States, Fourteenth Amendment 5
Judicial Code, Sec. 237(b) as amended 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 878

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN,

Petitioner,

vs.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Elmer Sullivan, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Pennsylvania, being the highest court of said State, in the above captioned case, the opinion and decision of said court having been rendered and filed January 11, 1937 (R. 33).

Question Involved.

Is the Act of Assembly of Pennsylvania, March 31, 1860, P. L. 382, Sec. 3, providing for punishment of escaped prisoners, of itself and as construed and applied herein, in

violation of the Fourteenth Amendment of the Constitution of the United States because of a denial of Due Process of Law and of the Equal Protection of the Laws?

The Act of 1860, March 31, P. L. 382, Section 3, reads:

> "*Escape or Rescue of Prisoners—Escape and Breaking Prison.*—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him. (1860, March 3, P. L. 382, Sec. 3.)"

Similar acts have been held invalid in *Ex parte Mallon,* 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 287 Pac. 729, 46 Okla. Cr. App. 233, and *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, on the ground that they were based on an unreasonable classification, operated unequally and deprived the prisoner of due process of law and the equal protection of the laws in

violation of the Fourteenth Amendment of the Constitution of the United States. Thus, if a prisoner serving five years escaped in concert with a prisoner serving ten years, the five-year prisoner could be sentenced to an additional five years, and the ten-year prisoner to an additional ten years for identically the same act. Further, the length of punishment is assessed at haphazard, being based not upon the essential heinousness of the act of escaping, but upon the purely adventitious circumstances of the duration of the former sentence.

Statement.

Petitioner, Elmer Sullivan, on April 26, 1929, entered a plea of guilty in the Court of Quarter Sessions of Erie County, Pennsylvania, at No. 25 May Sessions, 1929, to the following charge:

> 1st Count: Breaking and entering store building with intent to commit a felony therein;
> 2nd Count: Larceny.

He was sentenced by Judge William E. Hirt, as follows:

> "April 26th, 1929. And now, the Court sentence the defendant, Elmer Sullivan, to pay a fine of One Hundred Dollars to the Commonwealth (for the use of the County of Erie), pay the costs of prosecution, to restore the property taken, if not already done, or pay the value thereof to the owner thereof, and undergo an imprisonment in the Western Penitentiary of Pennsylvania (situate in the County of Allegheny), by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three years, and the maximum Six years, there to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with."

Petitioner was forthwith committed to the Western Penitentiary of Pennsylvania to serve said sentence.

Subsequently, on the 7th day of February, 1930, Petitioner was transferred to the Prison Farm, known as Rockview, situate in Centre County, State of Pennsylvania. On the 28th day of December, 1931, he escaped from the aforesaid Prison Farm, and shortly thereafter was apprehended.

On the 28th day of December 1931, Petitioner was indicted by the Court of Quarter Sessions of the Peace in and for the County of Centre, as follows:

> "The said Elmer Sullivan did wilfully, unlawfully and maliciously break out of said Western Penitentiary of Pennsylvania, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvaina."

On the 31st day of December, 1931, Petitioner was sentenced by Judge M. Ward Fleming, of the Court of Centre County, Pennsylvania, on the said charge of breaking out of prison as follows:

> "And now, December 31, 1931, the sentence of the Court is that you, Elmer Sullivan, pay the costs of prosecution, a fine of One Dollar ($1.00), and undergo imprisonment in the Western Penitentiary of the State of Pennsylvania for a period of not less than three years nor more than six years, to be computed from the expiration of your original sentence from Erie County, and that you stand committed until such sentence is complied with."

Petitioner in his petition for a writ of habeas corpus set forth that he is at the present time confined in the Western Penitentiary of Pennsylvania, in Allegheny County, Pennsylvania; that he is confined there illegally and by virtue of said illegal confinement is restrained of his liberty contrary to law. The opinion and judgment of the Court shows that the principal ground alleged was the unconstitutionality of the Pennsylvania statute with respect to Section 1 of the

Fourteenth Amendment to the Constitution of the United States. The court below specifically passed on the constitutional question (R. 34-37).

Jurisdiction.

The final order of the Supreme Court of Pennsylvania discharging the rule to show cause why a writ of habeas corpus should not be issued was entered January 11, 1937 (R. 33). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

ARGUMENT.

The basis of petitioner's application for a writ of habeas corpus was the alleged unconstitutionality of the Pennsylvania statute with respect to the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States. As will be seen from the brief attached hereto, the Pennsylvania statute operates to make the period of confinement for the crime of escaping from prison dependent not upon the intrinsic gravity of that offense but upon the prior offense conviction of which resulted in the prisoner's confinement in the first instance. The result is that if two prisoners are confined in a penitentiary, one for five years and the other for ten, and escape together, the sentence assessable would be five years for the one and ten years for the other, whereas the criminal acts of the two were identical. Thus the statute makes as many different grades of crime as there are prisoners undergoing different sentences. The theory of punishment, that it should be proportioned to the gravity of the offense, seems violated by a statute which punishes unequally two who commit identically the same offense, making the amount of punishment dependent upon something which was not part of the escape, but occurred long prior thereto.

Ex parte Mallon, 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 46 Okla. Cr. Ap. 233, 287 Pac. 729. See also *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168. All hold that statutes similar to the present statute are arbitrary, unreasonable, operate unequally and are contrary to the Due Process and Equal Protection provisions of the Fourteenth Amendment of the Constitution of the United States.

As shown in the present brief, the contention that the sentence on which the culprit is first imprisoned is a mere conditional one dependent upon non-escape, and that, therefore, the prisoner is on notice that if he escapes he may be compelled to serve double the original sentence, reduces itself to the argument that an unreasonable classification and an unequal statute, within the meaning of the Fourteenth Amendment, is rendered reasonable and equally operative, by giving notice of it beforehand to those affected. This seems illogical, particularly when the notice is a mere fiction of law achieved by writing the statute on the statute books where all presumably should read it.

Reasons for the Allowance of the Writ.

There is a clear conflict between the decision in the present case and the decisions of the highest courts of other States in *Ex parte Mallon,* 16 Idaho 723, 103 Pac. 374; *State* v. *Johnsey,* 46 Okla. Cr. App. 233, 287 Pac. 729. See also *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, holding that similar laws were unconstitutional, being in violation of the clauses of the Fourteenth Amendment of the Constitution of the United States guaranteeing due process of law and the equal protection of the laws. In addition, the highest court in Pennsylvania in the present case has decided a Federal question of substance not heretofore determined by this Court and probably contrary to the applicable decisions of this Court and of the highest courts of various States of the United States.

Further, the question involves the liberty and freedom of a large number of men in the State of Pennsylvania, at least ninety in the Western penitentiary and many more in the Eastern penitentiary.

ELMER SULLIVAN,
Petitioner.

WILLIAM E. LEAHY,
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BRIEF IN SUPPORT OF PETITION.

I.

The statute herein is violative of the Due Process and equal protection provisions of the Fourteenth Amendment and the decision below is in conflict with the decisions of the highest courts of other states with regard to similar statutes.

The Act of Assembly of March 31, 1860, P. L. 382, Section 3 reads:

> "*Escape or Rescue of Prisoners—Escape and Breaking Prison.*—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped,

> or broke prison although no actual escape was made by him. (1860 March 31, P. L. 382, Sec. 3.)''

Only the latter part of the above statute is involved in the present case. Apparently there are no decisions of Pennsylvania Courts on the present question.

In *In re Mallon,* 16 Idaho 737, 103 Pac. 374, the Supreme Court of Idaho held unconstitutional, as violative of the Fourteenth Amendment of the Constitution of the United States, a similar statute providing as follows:

> ''Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. (Sec. 6452, Revised Codes of Idaho.)''

In ruling on the precise question herein the court said:

> ''It will be observed that the punishment to be inflicted under this statute depends entirely upon the sentence the convict is serving at the time of the escape. If a convict is serving a one year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional year from the expiration of the first sentence.
>
> ''If a convict is serving a twenty year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional twenty years from the expiration of the first sentence. A maximum and minimum penalty, within which the court is given the discretion to fix the punishment according to the gravity of the offense, is not permitted. The offense is not divided into grades, unless it can be said that the grade of the crime is fixed by the sentence from which the convict is escaping; and the attorney general adopts this contention and argues that the statute does graduate the punishment according to the offense for which

the convict was serving at the time of the escape, and that this is a proper and reasonable classification.

"We think it may be stated as a general proposition of law that every person is entitled to the equal protection of the law, and that equal protection of the law means that equal protection and security should be given to all under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burden and charge than are equally imposed upon all others under like circumstances. (8 Cyc. 1058; *Barbier* v. *Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 27 L. Ed. 924.) Under this statute there would be as many different grades of crime as there are prisoners undergoing different sentences. A convict undergoing a one year sentence may conspire with a convict undergoing a twenty year sentence in planning and executing an escape, and may be the one who conceived the notion to escape, devised the plans and merely used the twenty year convict in executing such plans; yet, notwithstanding this fact, the latter, in case of conviction for escape, is required to serve an additional twenty year sentence after the expiration of the term for which he is serving, while the former is required to only serve a one year additional sentence. To say that the long term convict commits a greater offense than the short term convict is to base the punishment for such escape not upon the act of escaping from a State prison, but upon the act of escaping from a punishment fixed by a court in the judgment of conviction. The statute in defining the offense, however, makes the escape from the State prison the offense and not the escape from the punishment of the judgment fixed by the court upon trial. This classification is not natural, but arbitrary. To justify a classification of grades of crime, there must appear some good and valid reason why the classification should be made as made." * * *

"The very theory of punishment, to be imposed for violations of the law, is that such punishment should be proportioned to the gravity of the offense. For a

> statute to say that a convict confined in the State prison for a term of six months (as an illustration), who by force and violence breaks out of such State prison, upon conviction for such escape can only be confined for the term of six months, while a convict who peaceably escapes, without resorting to force or violence, shall be subject to a twenty year sentence because at the time of the escape he was serving such a sentence, is fixing an abritrary, unnatural and unjust punishment, and is contrary to the spirit and in violation of the Constitution of the United States as well as the Constitution of this State. While the legislature in prescribing and fixing punishment for crime, has very great latitude in classifying the same, still the rule is well recognized, that in making such classification it should be natural and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime." (In re Mallon, 16 Idaho, 743, 744, 745.)

The court then said:

> "a classification based upon the character of sentence being served is, in our judgment, arbitrary and unreasonable, and a clear violation of the provisions of the Constitution of this State and the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person equal protection before the law." (In re Mallon, 16 Idaho, 748.)

State v. *Johnsey*, 46 Okla. Cr. App. 233, 287 Pac. 729, is to the same effect with regard to a similar statute reading as follows:

> "Any person committed to a State prison who shall escape from or break said State prison with intent to escape therefrom, or who shall attempt by force or violence, or in any other manner, to escape from said prison, whether such escape be effected or not, shall upon conviction thereof be punished by imprisonment in said prison for a term not exceeding double the

term for which he was so sentenced, to commence from and after the expiration of his former sentence." (State *v.* Johnsey, 287 Pac. 729.)

The court said:

"The very theory of punishment to be imposed for violations of the law is that such punishment should be proportioned to the gravity of the offense. While the Legislature in prescribing and fixing punishment for crime has very great latitude in classifying the same, still such classification should be natural and not arbitrary and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. The authorities are practically unanimous upon the question that the classification must be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. *State* v. *Lewin,* 53 Kan. 679, 37 P. 168; *Ex parte Mallon,* 16 Idaho 737, 103 P. 374, 22 L. R. A. (N. S.) 1123; *Hurtado* v. *Calif.,* 110 U. S. 516-534, 4 S. Ct. 292, 28 L. Ed. 232; 8 Cyc. 1058, 1059; *Barbier* v. *Connolly,* 113 U. S. 27, 5 S. Ct. 357, 27 L. Ed. 924.

"An examination of this statute leads to the conclusion that the classification is arbitrary, and that the punishment is not fixed according to the heinousness or gravity of the act, but is left to be fixed by matters occurring independent of the crime.

"Section 8361, *supra,* is unconstitutional for the reason that it violates that part of the Fourteenth Amendment to the Constitution of the United States of America which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws. *Bowman* v. *Lewis,* 101 U. S. 22, 25 L. Ed. 989; *In re Kemmler,* 136 U. S. 436, 10 S. Ct. 930, 34 L. Ed. 524." (State *v.* Johnsey, 287 Pac. 730.)

In *State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, the statute involved was somewhat different, but the principle was the same. The statute reads:

"Sec. 28. That in case any convict shall escape from the penitentiary, or from the custody of any officer, or to make an attempt to so escape, or shall join in any mutiny, or shall make an attempt at mutiny, or in any manner do any act to cause others to mutiny, while in confinement in the State penitentiary, or while in the custody of any officer, the said convict shall be taken by the warden before the district court of Leavenworth county, on information filed by the warden; and if the charge be sustained, the time said convict had served in the penitentiary prior to such act as charged shall not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court of confinement in the State penitentiary for the full term for which he or she was sentenced by the court before whom he or she was convicted and undergoing sentence at the time of the violating the provisions of this section: provided, that no limitation shall bar proceedings under this section." (State *v.* Lewin, 37 Pac. 168, 169.)

After holding that this statute was unconstitutional with respect to the State Constitution the court said:

"The section is open to other serious constitutional objections. Its provisions do not commend themselves to our sense of justice. The punishment required to be imposed is not to be measured by the offense committed, but is made to depend wholly on the date of the sentence under which the prisoner was confined in the penitentiary at the time he committed the act for which he is punished. The court is required simply to obliterate the time that he has been confined in the penitentiary, for his original offense, and, as a punishment for the escape or mutiny, to reimpose the sentence given by the court for his prior crime. So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day, in concert, under precisely the same circumstances, and with exactly equal guilt, would receive wholly different punishment. If one had been confined but for

a day, his punishment would be increased but by one day, while the other, who might have been confined for 20 years, would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws? The inherent vice of such an enactment is not fully apparent until the fact is recognized that at the penitentiary, where there are no witnesses of what transpires but convicts and officers, the oath of a convict would have little weight against that of an officer, and a charge preferred and backed up by the oath of an officer would in most cases insure a conviction, thus unduly increasing the necessarily great power of the warden over the inmates under him. We are not disposed to strain our construction of constitutional safeguards to uphold such a statute. We think section 28 wholly void, and the order of the district court, quashing the information, is sustained." (State *v.* Lewin, 37 Pac. 169.)

The Pennsylvania court in the present case specifically refused to follow the above cases (R. 37).

In addition to the cases already cited, the decision below is inferentially in conflict with this Court's decisions in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Barbier* v. *Connolly*, 113 U. S. 27; *Hurtado* v. *Calif.*, 110 U. S. 516-534; *Gulf R. Co. v. Ellis*, 165 U. S. 150; *Marchant* v. *Pa. R. Co.*, 153 U. S. 380; *Santa Clara Co.* v. *Southern Pac. R. Co.*, 118 U. S. 394, and other classic adjudications by this Court on the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

If it be argued that the sentence under which the accused was first imprisoned was a mere conditional one, dependent upon non-escape, and therefore the prisoner is on notice by reason of the escape statute that if he escapes

he must serve the additional sentence therein provided, we say in answer that an unreasonable and arbitrary classification and an entirely capricious statute is not rendered reasonable and equally operative by giving prisoners notice of it beforehand, particularly when the notice is a mere fiction of law resulting from the embedding of the statute into the statute books.

II

Considering the instant case as one representative of a large group wherein the court below has uniformly imposed the maximum sentence under the Act in question, has not the said Act been applied in such manner as to deny due process of law and the equal protection of the laws?

Reference is here made to a letter written by Judge M. Ward Fleming, Judge of Centre County, Pennsylvania, and addressed to the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania, which is to be found among the papers in the case of *Commonwealth, ex rel. Otto Rymeus,* v. *Stanley Ashe,* Warden, Western Pennsylvania Penitentiary, at Miscellaneous Docket No. 821, in the Supreme Court of the State of Pennsylvania, and is a part of the record of the said captioned case. Said letter reads as follows:

"Judges Chambers,
Forty-ninth Judicial District, Pennsylvania,
M. Ward Fleming, President Judge.

BELLEFONTE, PA., August 18, 1934.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania.

GENTLEMEN:

In the matter of Commonwealth ex rel. Otto Rymeus vs. Stanley Ashe, Warden, Western Pennsylvania Peni-

tentiary, No. 1620, October Term, 1934, by a Habeas Corpus, I beg to state that an error was committed in imposing sentence upon the relator for escaping from the prison farm at Rockview, Center County, Pennsylvania.

Since the establishment of Rockview *the policy of this Court* has been to impose upon inmates escaping therefrom, a sentence exactly the same as that originally imposed in the County from which they were committed, such sentence to be computed from the expiration of such original sentence. Cards are handed to the Court before sentence imposed showing such original sentence and the name of the County from which the inmate comes.

Whether the card was in error or we did not carefully look at the minimum sentence imposed upon Rymeus in Washington County, I cannot say. However, it appears that we made one half of the maximum of the Washington County sentence the minimum when imposing sentence for escape. The records now disclose that Rymeus was sentenced by Judge McIllvaine to not less than three years and three months to more than thirteen years. We halved the maximum of thirteen years and imposed a minimum of six and one-half years and a maximum of 13 years when imposing sentence for escape. Under the Statute our maximum sentence could not have been greater than the original sentence from Washington County and should have been three years and three months to thirteen years.

With kind personal regards, I am,

Sincerely yours,

M. WARD FLEMING."

Reference is here also made to statistics compiled by your petitioner relative to the policy of the lower court in sentencing escaped prisoners. An examination of said statistics discloses that in each case investigated or caused to be investigated by your petitioner, that the lower court has imposed the maximum sentence.

The statistics referred to consist of:

An affidavit setting forth an examination of all prisoners originally sentenced from Erie County courts, who were later confined in the Prison Farm known as Rockview, and subsequently escaped from said prison farm. The prisoners upon their apprehension within the past five years were sentenced by the Court of Quarter Sessions of Centre County, said examination and attached affidavit have been made by William W. Knox, Esq., a member of the Bar of the Supreme Court of Pennsylvania.

Also an affidavit by M. W. Gettig, a member of the Bar of Centre County, Pennsylvania, setting forth a complete record of the Quarter Sessions Court of Centre County for the past five years relative to the sentencing of escaped prisoners from the Rockview Prison Farm. These statistics and affidavits are a matter of record filed in the Supreme Court of Pennsylvania in this case and may be found in petitioner's brief to the Pennsylvania Supreme Court, copies of which accompany this petition.

Petitioner, due to lack of funds, is not able to set forth the records of all prisoners originally sentenced from other counties in this state, which prisoners were later confined to Rockview, escaped therefrom, and were subsequently sentenced from Centre County Court. Petitioner did, however, cause an investigation to be made as to all prisoners sentenced by the Erie County Court of Quarter Sessions and Oyer and Terminer, who later escaped from the Prison Farm at Rockview, and who were within the past five years sentenced on an escape charge by the Centre County Court. This investigation disclosed that in each instance they were sentenced to the maximum term by the said Centre County Court; that is, the court sentenced each of these escape convicts to a sentence the same as the original one imposed by the Erie County Courts, to be computed from the expiration of their individual original sentence. In other words,

there has been a steadfast refusal on the part of the Centre County Court to exercise any discretionary power whatsoever in sentencing these escape prisoners, but, on the other hand, each and every one was sentenced to the maximum term provided by the Act of Assembly referred to herein.

It is well to here point out that the act of the Legislature in question imposes a duty upon the court to exercise discretion, otherwise the words "not exceeding" would not have been written into the act.

Assuming that the legislature meant that the court should exercise discretion in imposing sentence under the act and assuming that there has not only been an abuse of discretion on the part of the Centre County Court, but, on the other hand, there has been a total lack of exercise of any discretion, it is therefore a fair conclusion that the Act of Assembly pertaining to prison break and escape has been applied in such manner as to deny the equal protection of the laws.

If the Centre County Court has properly used its discretion in adopting the policy of sentencing violators under the act to the maximum term, then this very fact in itself is the strongest argument that an Act of Assembly which permits the imposition of a maximum sentence in each instance is an act that deprives those who violate its terms of a fair and equal administration of justice, and further deprives such persons of the equal protection of the laws. If the Centre County Court has in the instant case and in other cases, of which the instant case is a representative one, abused its discretion in imposing the maximum sentence permitted under the act, then it is no redress for those who have been compelled to suffer the imposition of a maximum sentence merely to condone the past acts of the said court, but, on the contrary, an act so interpreted, and criminal justice so administered, is contrary to natural justice, is unfair and is in violation of the rights of all men to be treated with equality before the law.

It is submitted that the instant case should be considered as representative and not merely as a singular case. The records disclose that there are upwards of 90 men undergoing sentence under this escape act in the Eastern Penitentiary alone. These men are serving terms of from six months to 30 or 40 years or more, depending on the original sentence they were undergoing at the time they escaped. In the instant case the court sentenced the defendant for a period of three to six years for the offense of escaping and it is apparent that it is a mild punishment compared with some of the cases which the records disclose, wherein sentences were meted out to defendants for the same offense, namely, that of escape, for a period of 15, 20 and 30 and even a greater number of years. In many instances the sentence imposed by the Judge under the escape law is tantamount to a life sentence, for the defendants involved were of such an age that their expectancy of life will never permit them to regain freedom.

So far as counsel has been able to learn from a diligent search of the decisions of the United States Supreme Court, this particular question has never before been presented for the Court's consideration. While it is true that this Court has upheld the principle of additional punishment in cases involving punishment of habitual criminals, in cases such as *Missouri* v. *Lewis,* 101 U. S. 22; *Graham* v. *W. Va.,* 224 U. S. 616, nevertheless, it is contended that these cases, and the subsequent decisions following this ruling of law, do not properly apply in the instant case for the reason that in habitual criminal acts the punishment for all persons committing a second or additional offense is equal. In other words habitual criminal acts treat like offenders with equal justice.

Such is not the case under the law involved here, for, under the Pennsylvania escape law, two persons may escape, under the same circumstances and at the same time,

and receive entirely different sentences. It is contended that the substantive offense is escape and that there are as many different punishments as there are original sentences, whereas, under habitual criminal acts, the substantive offense is the commission of a second or additional offense and the punishment is the same to all like offenders. That escape is, in itself, a substantive offense and the punishment thereof is not merely incidental to the punishment for the offense for which the prisoner may have been committed, is ably set forth by the Superior Court of Pennsylvania in the case of *Com. ex rel.* v. *Francies,* 73 Pa. Superior Court 385. In that case the relator had been originally sentenced for false pretense, which sentence was invalid. While imprisoned on that charge, he escaped, was recaptured, tried, convicted and sentenced under the escape act of 1860. He thereupon petitioned the court for a writ of habeas corpus. The court, although admitting that he had been erroneously committed originally, nevertheless refused to issue the writ for the reason that he was clearly guilty of the offense of breaking or escaping from either a penitentiary or a jail, which is a substantive offense against the administration of public justice and hence his imprisonment on the latter charge was legal.

Petitioner therefore argues that the offense of escape is an offense in itself. In other words, as stated by the Superior Court of Pennsylvania, referred to above, "a substantive offense" and should be punished as such without regard to an original sentence, or one which may have been previously imposed. If this were not the law, that is, if the offense of escape were dependent upon or incidental to the original confinement, then the Superior Court in *Commonwealth* v. *Francies* would have been compelled to issue the writ.

Indeterminate sentence laws, which have been held valid, may be quoted as an argument by the state, however, such

cases provide for a minimum and maximum sentence, and where sentences of this kind are given all offenders are treated equally, that is, each one offending under such act is subject to an equal sentence, although the sentence itself may be an indeterminate one.

Counsel for petitioner has read the laws passed by the State Legislatures where escape laws similar to the Pennsylvania Statute involved in this case have been held invalid. The present laws passed subsequently to the original harsh legislation are much more lenient, and, furthermore, provide for a definite punishment for the crime of escape, that is, such as a five-year maximum sentence. In other words, the State Legislatures of the respective states, wherein these harsh laws were declared invalid, enacted legislation punishing the crime of escape *irrespective* of the length of time the prisoner might be serving at the time of his escape.

Counsel for your petitioner has also examined the present laws pertaining to the punishment for escape in many states throughout the entire nation, and in many of the states the laws of the respective states provide for a definite sentence, or a minimum and maximum sentence, but in no other instances than cited is the punishment made to depend upon the duration of the sentence that the prisoner is undergoing at the time of his escape.

Conclusion.

It is respectfully submitted that the writ of certiorari should be granted and the judgment below reversed.

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Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 25

Commonwealth of Pennsylvania, ex rel. ELMER SULLIVAN, *Petitioner*

v.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania, *Respondent*

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion of the Court Below	1
Jurisdiction	1
Statute Involved	2
Statement	3
Specification of Errors to Be Relied On	5
Argument	
I. The Statute in Making the Sentence for Escape Depend Upon the Original Sentence Makes an Unreasonable Classification	5
II. The Cases in Petitioner's Favor	8
III. The Practical Construction of the Present Statute	14
IV. Escape Laws of Other States	20
Conclusion	25

TABLE OF CASES.

Barbier v. Connolly, 113 U. S. 27	10, 12, 20
Bowman v. Lewis, 101 U. S. 22	12
Commonwealth ex rel. Rymeus v. Ashe, Miscellaneous Docket No. 821, Court of Common Pleas, Allegheny County, Pa.	14
Ex parte Mallon, 16 Idaho 737; 103 Pac. 374	12
Graham v. West Virginia, 224 U. S. 616, 623	7
Hurtado v. California, 110 U. S. 516-534	12
In re Kemmler, 136 U. S. 436	12
In re Mallon, 16 Idaho 737; 103 Pac. 374	9, 11
Moore v. Missouri, 159 U. S. 673	7
State v. Johnsey, 46 Okla. Cr. App., 233; 287 Pac. 729.	11, 12
State v. Lewin, 53 Kan., 679; 37 Pac. 168	12, 13, 14
United States v. Noveck, 271 U. S. 201	5
United States v. Scharton, 285 U. S. 518	5

STATUTES CITED.

Page

Judicial Code, Sec. 237 (b), as amended by Act of February 13, 1925 1
Pennsylvania Act of 1860, March 31, P. L. 382, Sec. 3 ..... 2, 3, 5
18 U. S. C. A., Sec. 753 (h), 1936 Pocket Part 9
Alabama Code of 1928, Sec. 4012, (1933, p. 627, Sec. 2) 20
Arizona, Revised Code of 1928, Struckmeyer, Sec. 4539; Sec. 4485 20
Arkansas, Digest of Statutes, Crawford & Moses, Sec. 2575; Sec. 2579 20
California, Penal Code, Deering, 1931, Chap. III, p. 55, Sec. 105; Sec. 106; Sec. 107 21
Connecticut, General Statutes of, Revision of 1930, Chap. 326, Sec. 6173; Sec. 6175; Sec. 6178..... 22
Delaware, Revised Code of, 1935, Sec. 18; Sec. 4135.... 22
Florida, Compiled General Laws of, 1927, Sec. 8588, (6250) 22
Georgia, Parks Annotated Code, Vol. 6, (1914) Sec. 321 (sec. 319); Sec. 319 (sec. 314) 20
Idaho, Revised Codes of, Sec. 6452 9
Idaho, Annotated, Vol. 1, p. 956, (1932) Sec. 17-803; Sec. 17-804; Sec. 17-112; Sec. 17-113 22
Illinois, Annotated Statutes, Smith-Hurd, Vol. 5, Chap. 118, Sec. 18 20
Indiana, Burns, Indiana Statutes Annotated, 1933, Vol. 4, St. 2609, 10-1807; 10-1808, (2610)..... 22
Iowa, Code of, 1931, Sec. 13351; (S. 13, Sec. 4897-a; C 24, 27, sec. 13351) 21
Kansas, General Statutes Annotated, Corrick, 1935, Chap. 21, Art. 7; Sec. 21-733; Sec. 21-732; Sec. 21-734 22
Kentucky, Carrals' Kentucky Statutes, 1930, p. 741, Sec. 1232 21
Louisiana, Code of Criminal Procedure, Dart, 1932, Sec. 923 21
Maine, Revised Statutes of, 1930, Chap. 133, p. 1565, Sec. 16, R. S. c. 124. Chap. 152, Sec. 45, R.S. C. c. 142 22
Maryland, Annotated Code of, Bagby, Vol. 1, p. 1013, Art. 27, Sec. 138 22

Page

Massachusetts, General Laws of, Tercentenary Ed., 1932, Vol. II, p. 3154, Chap. 268, Sec. 16, Amendment, 1934 22
Michigan, Compiled Laws of State of, 1929, Vol. 3, p. 5809, Law 16586, Sec. 24 22
Minnesota, Mason's Minn. Statutes, 1924, Vol. 2, Chap. 96, p. 1980, Sec. 10007; Sec. 10008; Chap. 106, p. 2097, Sec. 10867; Chap. 93, p. 1966, Sec. 9921; Sec. 9923; Sec. 9922; Sec. 3917; Sec. 3918 23
Mississippi, Code, 1930, Annotated, p. 565, Sec. 909... 21
Missouri, Revised Statutes of, 1929, Vol. 1, Chap. 30, p. 1112, Sec. 3912; Sec. 3913; Sec. 3914; Sec. 3915; Sec. 3916 23
Montana, Revised Codes of, 1935, Sec. 10867..... 21
Nebraska, Compiled Statutes, 1929, Sec. 28-736..... 21
Nevada, Compiled Laws, 1929, Hillyer, Vol. 5, p. 3053, Sec. 10023 21
New Hampshire, Public Laws of, 1926, Vol. II, Chap. 400, p. 1533; Sec. 13; Sec. 14 23
New Jersey, Cumulative Supplement to Compiled Statutes, Vol. 1, p. 835, Crimes 52-12; Compiled Statutes, 1709-1910, Vol. 3, p. 2953; Sec. 38 23
New Mexico, Annotated Statutes, 1929, Sec. 75-133 21
New York, McKinney's Consolidated Laws of, Anno., Book 39, Penal Law, p. 587, Sec. 1694; Sec. 1695; Sec. 1699 23
North Carolina, Annotated Code, 1931, Sec. 4404, Supplement, 1933, Sec. 7748 (V) 21
North Dakota, Compiled Laws of, 1913, Vol. II, Penal Code, Chap. 12, Sec. 9351; Sec. 9352; Sec. 9353; Sec. 9204; Sec. 9206 23
Ohio, Page's Annotated General Code, Vol. 2, p. 5571, Offenses Against Public Justice, Tit. I, Chap. 8, Sec. 12840; Sec. 12831 23
Oklahoma, Act approved May 8, 1935, Senate Bill No. 276; Sec. 2053, Oklahoma Code, (Harlow)..... 23
Oregon, Code Annotated, 1930, Vol. 1, p. 1313, Sec. 14-418..... 21
Rhode Island, General Laws of, Chap. 394, p. 1687, Title 39 (1923), Sec. 6002; Amended, 1931; Sec. 27; Sec. 6003 24
South Dakota, Compiled Laws, 1929, Vol. 1, p. 1113, Sec. 3732 21

Page

Tennessee, Code of, 1932, Williams, Shannon, Harsh, Sec. 12151; Sec. 12154 21
Utah, Revised Statutes of, 1933, Chap. 48, Penal Code, Sec. 103-48-2; Sec. 103-48-3; Sec. 103-1-16..... 24
Vermont, Public Laws, 1933, Sec. 8671..... 21
Virginia, Annotated Code of 1930, Sec. 4507; Sec. 4508 21
Washington, Remington's Compiled Statutes of, Vol. 1, 1922, Sec. 2342; Sec. 2265; Sec. 2266 24
West Virginia, Official Code, 1931, p. 1529, Art. 8, Sec. 1; Art. 8, Sec. 2 21
Wisconsin, Wisconsin Statutes, 1935, Sec. 346, 40; Sec. 346, 45 24
Wyoming, Revised Statutes, 1931, Sec. 32-823..... 21

Supreme Court of the United States

OCTOBER TERM, 1937

No. 25

Commonwealth of Pennsylvania, ex rel. ELMER SULLIVAN, *Petitioner*

v.

STANLEY ASHE, Warden, State Penitentiary, Western District of Pennsylvania, *Respondent*

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR PETITIONER.

OPINION OF THE COURT BELOW.

The opinion of the Court below (R. 22) is reported in 45 Advance Reports of Pennsylvania (The Legal Intelligencer) page 305.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that there is drawn in question the validity of a statute of the Commonwealth of

Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the United States.

The judgment below was rendered and filed January 11, 1937, (R. 22). Petition for a writ of certiorari was filed herein April 9, 1937, and the petition granted May 17, 1937, (R. 27).

Petitioner in the present writ seeks review of a judgment of the Supreme Court of Pennsylvania, the highest Court of the State, dismissing a petition for a writ of habeas corpus, (R. 26), which alleged that petitioner was illegally confined and restrained of his liberty in the Western Penitentiary of Pennsylvania, (R. 2). The opinion and judgment, (R. 23), of the Court below shows that the principal ground alleged was that the Pennsylvania statute above referred to was in violation of the Fourteenth Amendment, (R. 23), with respect to the Equal Protection provision in that the statute provides unequal sentences for the offense of breaking prison depending upon what petitioner claimed was the merely adventitious circumstance of the duration of the sentence he was serving when he so escaped, (R. 23). The Court below specifically passed upon the constitutional question, (R. 22-26), and no non-federal basis for the decision was assigned or exists.

STATUTE INVOLVED.

The Act of 1860, March 31, P. L. 382, Section 3, reads:

> **"Escape or Rescue of Prisoners—Escape and Breaking Prison.**—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeaner punishable, on conviction, by imprison-

ment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; **if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.** (1860, March 31, P. L. 382, Sec. 3.)" (Emphasis ours).

STATEMENT.

The petition for a writ of habeas corpus recites that petitioner on April 26, 1929, entered a plea of guilty in the Court of Quarter Sessions of Erie County, Pennsylvania, to the charge of breaking and entering and larceny. The sentence was as follows:

> "Sentenced to Western Penitentiary of Pennsylvania (situate in the County of Allegheny) by separate or solitary confinement at labor, for an indefinite term, the minimum of which shall be Three Years and the Maximum Six Years, and thereby to be kept, fed, clothed and treated as the law directs and stand committed until the sentence be complied with." (R. 1)

Petitioner was forthwith committed to the Western Penitentiary of Pennsylvania to serve his sentence, (R. 1). On February 7, 1930, petitioner was transferred to the Prison Farm known as Rockview in Centre County, and on December 28, 1931, escaped from prison but was shortly thereafter apprehended (R. 2). On December 28, 1931, he was

indicted for "wilfully, unlawfully and maliciously" breaking out of the Western Penitentiary of Pennsylvania and upon conviction was sentenced, on December 31, 1931, as follows:

> "To pay the cost of prosecution, a fine of $1.00 and undergo imprisonment in the Western Penitentiary, State of Pennsylvania, for a period not less than three years, nor more than six years, to be computed from the expiration of your original sentence from Erie County and that you stand committed until such sentence is complied with." (R. 2)

Petitioner was forthwith committed to the Western Penitentiary in compliance with the above sentence and thereafter filed a petition for a writ of habeas corpus which presents the present case. In this petition he alleged that he was confined in the penitentiary illegally and restrained of his liberty contrary to law, (R. 2). A rule to show cause having been granted, (R. 21), a hearing and argument ensued with the result that on January 11, 1937, the rule was discharged, (R. 22), pursuant to the opinion of the Court below, (R. 22-26).

The opinion below shows that the only question (except a question referred to in the last paragraph of the opinion, (R. 26), which is not pressed here) was the alleged unconstitutionality of the Pennsylvania escape statute. The Court below in its opinion stated:

> "The present writ is based upon the alleged unconstitutionality of the statute under which the sentence was imposed. The act provides, inter alia, that a prisoner breaking penitentiary or jail is guilty of a misdemeanor and upon conviction shall be sentenced to undergo an imprisonment to commence from the expiration of, and for a period of time not exceeding, the original sentence by virtue of which he had been imprisoned. The criticism leveled at the act is that for the offence of breaking prison unequal sentences are thus provided, depending upon what, it is contended, is the merely adventitious circumstance of the dura-

> tion of (fol. 35a) a former sentence of the offender. It is claimed that this is a denial of the equal protection of the laws, and therefore a violation of section 1 of the fourteenth amendment of the Constitution of the United States. It is pointed out that in this very case the petitioner, Sullivan, made his escape from Rockview simultaneously with a fellow prisoner, Clarence McCann. The two were apprehended at the same time and sentenced on the same day, but McCann received a sentence of only one to two years because that was the extent of his original sentence." (R. 23)

The Court below dismissed the Petition, (R. 26), holding there was no violation of the Equal Protection clause of the 14th Amendment, (R. 26)

SPECIFICATION OF ERRORS TO BE RELIED ON.

The Court below erred in holding that the Pennsylvania Escape statute (The Act of 1860, March 31, P. L. 382, Sec. 3) in providing that one who escapes, upon conviction:

> "shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped",

was not violative of the Fourteenth Amendment of the Constitution of the United States with respect to the Equal Protection of the Laws.

ARGUMENT.

I.

The Statute in Making the Sentence for Escape Depend Upon the Original Sentence Makes An Unreasonable Classification.

Under *United States* v. *Scharton*, 285 U. S., 518 and *United States* v. *Noveck*, 271 U. S., 201, and cases cited, an offense is constituted by the words of the statute denouncing it.

Thus in the Scharton case this Court held that the offense of attempting to "evade or defeat" an income tax does not involve a fraud upon the United States, the element of fraud not necessarily and in so many words being brought into the offense of attempting to "evade or defeat". In the same way in the present case the offense of escape is created by the words of the statute itself, and if so it means escape from the physical prison itself.[1] The statute does not denounce escape from the *punishment* of the original sentence. Yet as the statute reads, the punishment for escape is made dependent, not upon the facts and circumstances of the escape itself, but upon the *punishment* awarded by the original sentence.

We feel that this is an unreasonable classification. Thus, if two prisoners are confined in a penitentiary, one for five years and the other for ten, and escape together under exactly the same circumstances, there being no greater aggravating circumstances as to one prisoner than as to the other, the sentence assessable under the present statute would be five years for the one and ten years for the other, whereas the criminal acts denounced by the statute itself were identical.[2] In this way the statute makes as many grades of punishment for the same acts as there are prisoners undergoing different sentences, or, conversely, in creating a multitude of classes, the statute hardly makes a classification at all. The theory of punishment, that it should be proportioned to the gravity of the offense, seems violated by a statute which punishes unequally two who commit iden-

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[1] The statute reads: "if any prisoner imprisoned in any penitentiary • • • *shall break such penitentiary or jail* • • • upon conviction of said offense shall be sentenced, etc.".

[2] This was precisely the situation in the present case. Petitioner, imprisoned for from three to six years, escaped simultaneously with a fellow prisoner named McCann serving a sentence of from one to two years. The present petitioner was sentenced for escape for a term of from three to six years, and McCann sentenced for the same escape to a term of from one to two years. (R. 23.)

tically the same statutory offense, *i. e.*, escape from physical prison walls, making the amount of punishment dependent upon something which was not part of the escape and occurred long prior thereto, the facts and circumstances relating to which the Judge sentencing for escape is entirely ignorant of.

It is no answer to this to cite, as the Court below did, decisions sustaining habitual criminal statutes, such as *Graham* v. *West Virginia*, 224 U. S., 616, 623 and *Moore* v. *Missouri*, 159 U. S., 673. In habitual criminal statutes their sentencing provisions are, in effect, read into the sentencing provision of the statute denouncing the particular offense. The sentence for the second offense is made dependent upon the fact, easily ascertainable, of a prior conviction, and so the classification applies to all second offenders alike and is reasonable. The present statute, however, makes the sentence depend, within the leeway given the Judge trying the escape charge, upon the facts and circumstances which led up to the quantum of the first sentence—facts and circumstances of which the Judge trying the escape charge could have no knowledge, involving a variety of factors entirely unrelated to the escape charge.

We think it error to argue as the Court below did, (R. 24), that one serving a heavier sentence is potentially a greater danger to society than one serving a lighter sentence. This is not necessarily so. Sentences are not always purely reformatory or graded solely on the gravity of the crime; sometimes they are exemplary and the Court purposely increases a sentence upon an offender to act as a deterrent to others. If the crimes were far enough apart, *i. e.*, if one were a felony, the other a misdemeanor, possibly the heavier sentence might roughly classify the worse offender. But as between an over-enthusiastic husband serving five years for perjury in a divorce case and a drunken driver serving one year, (the limit) for negligent homicide, who can say that the husband-convict is a "greater potential danger to

society"? Common sense tells us that he is not. Yet if the two escape together, one can be sentenced to five years and the other to one.

The inequality of the sentencing provision of the present statute is not removed by the fact that the statute confides a certain amount of discretion to the trial Judge. This discretion is a judicial discretion and must be exercised *within*, not *without*, the facts and circumstances attending the escape. It can hardly be argued that the escape statute in permitting the trial Judge to sentence an escaping prisoner to confinement "for a period of time *not exceeding* the original sentence" intended the trial Judge to take into consideration anything other than what was judicially before him on the escape charge, and this excludes all the myraid considerations leading up to the original sentence, as to which likewise there was judicial discretion. In any event it may be noted that as to the *kind* of punishment the escape statute leaves no discretion whatever but makes it mandatory that the punishment for escape should be "of the like nature" as the punishment awarded by the original sentence. Thus, however slight or technical the offense of escape might be (a "trusty" might peaceably overstep the bounds merely by a yard), if his original sentence provides for solitary confinement at hard labor his sentence for escape must likewise carry along with it a provision for solitary confinement at hard labor. In this aspect no element of discretion whatever is present in the statute herein.

II.

The Cases in Petitioner's Favor.

There seem to be no Federal cases specifically passing on the present question, the Federal Escape Statute providing a straight fine and imprisonment for not more than five years where the original sentence was for a felony, and

a fine and imprisonment for not more than one year where the original sentence was for a misdemeanor, (18 U. S. C. A., Sec. 753 (h), 1936 Pocket Part). The leading authority in the States seems to be *In re Mallon*, 16 Idaho 737, 103 Pac., 374. It is, of course, admitted that in that case the statute made the escape sentence exactly equal to the original sentence, confiding no discretion to the Judge as to the *length* of sentence, just as the present statute confides no discretion to the Judge as to the *nature* of the sentence. This difference however does not destroy the reasoning of the decision.

In *In re Mallon, supra*, the Supreme Court of Idaho held unconstitutional, as violative of the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States, a statute providing as follows:

> "Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. (Sec. 6452, Revised Codes of Idaho)."

In ruling on the question herein the Court said:

> "It will be observed that the punishment to be inflicted under this statute depends entirely upon the sentence the convict is serving at the time of the escape. If a convict is serving a one year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional year from the expiration of the first sentence.
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> "If a convict is serving a twenty year sentence and escapes, upon conviction of such escape he must be sentenced to serve an additional twenty years from the expiration of the first sentence. A maximum and minimum penalty, within which the court is given the discretion to fix the punishment according to the gravity

of the offense, is not permitted. The offense is not divided into grades, unless it can be said that the grade of the crime is fixed by the sentence from which the convict is escaping; and the attorney general adopts this contention and argues that the statute does graduate the punishment according to the offense for which the convict was serving at the time of the escape, and that this is a proper and reasonable classification.

"We think it may be stated as a general proposition of law that every person is entitled to the equal protection of the law, and that equal protection of the law means that equal protection and security should be given to all under like circumstances in his life, his liberty and his property and in the pursuit of happiness, and in the exemption from any greater burden and charge than are equally imposed upon all others under like circumstances. (8 Cyc. 1058; *Babier* v. *Connolly,* 113 U. S., 27, 5 Sup. Ct. 357, 27 L. Ed. 924). Under this statute there would be as many different grades of crime as there are prisoners undergoing different sentences. A convict undergoing a one year sentence may conspire with a convict undergoing a twenty year sentence in planning and executing an escape, and may be the one who conceived the notion to escape, devised the plans and merely used the twenty year convict in executing such plans; yet, notwithstanding this fact, the latter, in case of conviction for escape, is required to serve an additional twenty year sentence after the expiration of the term for which he is serving, while the former is required to only serve a one year additional sentence. To say that the long term convict commits a greater offense than the short term convict is to base the punishment for such escape not upon the act of escaping from a State prison, *but upon the act of escaping from a punishment* fixed by a court in the judgment of conviction. The statute in defining the offense, however, makes the *escape from the State prison* the offense and not the escape from the *punishment of the judgment* fixed by the court upon trial. This classification is not natural, but arbitrary. To justify a classification of grades of crime, there must appear some good and valid reason why the classification should be made as made.

* * * * *

> "The very theory of punishment, to be imposed for violations of the law, is that such punishment should be proportioned to the gravity of the offense. For a statute to say that a convict confined in the State prison for a term of six months (as an illustration), who by force and violence breaks out of such State prison, upon conviction for such escape can only be confined for the term of six months, while a convict who peaceably escapes, without resorting to force or violence, shall be *subject to* a twenty year sentence because at the time of the escape he was serving such a sentence, is fixing an arbitrary, unnatural and unjust punishment, and is contrary to the spirit and in violation of the Constitution of the United States as well as the Constitution of this State. While the legislature in prescribing and fixing punishment for crime, has very great latitude in classifying the same, still the rule is well recognized, that in making such classification it should be natural and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime." (In re Mallon, 16 Idaho, 743, 744, 745; Italics ours).

The Court then said:

> "a classification based upon the character of sentence being served is, in our judgment, arbitrary and unreasonable, and a clear violation of the provisions of the Constitution of this State and the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person equal protection before the law." (In re Mallon, 16 Idaho, 748.)

State v. *Johnsey,* 46 Okla. Cr. App., 233, 287 Pac., 729, is to the same effect with regard to a statute reading as follows:

> "Any person committed to a State prison who shall escape from or break said State prison with intent to escape therefrom, or who shall attempt by force or violence, or in any other manner, to escape from said prison, whether such escape be affected or not, shall upon conviction thereof be punished by imprisonment

in said prison for a term *not exceeding double* the term for which he was so sentenced, to commence from and after the expiration of his former sentence." (*State* v. *Johnsey,* 287 Pac., 729; Italics ours.)

The Court said:

"The very theory of punishment to be imposed for violations of the law is that such punishment should be proportioned to the gravity of the offense. While the Legislature in prescribing and fixing punishment for crime has very great latitude in classifying the same, still such classification should be natural and not arbitrary and should be made with reference to the *heinousness or gravity of the act or acts made a crime,* and not with reference to *matters disconnected with the crime.* The authorities are practically unanimous upon the question that the classification must be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime. *State* v. *Lewin,* 53 Kan., 679, 37 P. 168; *Ex parte Mallon,* 16 Idaho 737, 103 P. 374, 22 L.R.A. (N.S.) 1123; *Hurtado* v. *Calif.,* 110 U. S. 516-534, 4 S. Ct. 292, 28 L. Ed. 232; 8 Cyc. 1058, 1059; *Barbier* v. *Connolly,* 113 U. S. 27, 5 S. Ct., 357, 27 L. Ed. 924.

"An examination of this statute leads to the conclusion that the classification is arbitrary, and that the punishment is not fixed according to the heinousness or gravity of the act, but is left to be fixed by matters occurring independent of the crime.

"Section 8361, *supra,* is unconstitutional for the reason that it violates that part of the Fourteenth Amendment to the Constitution of the United States of America which prohibits the State from denying to any person within its jurisdiction the equal protection of the laws. *Bowman* v. *Lewis,* 101 U. S., 22, 25 L. Ed. 989; *In re Kemmler,* 136 U. S., 436, 10 S. Ct. 920, 34 L. Ed. 524". (*State* v. *Johnsey,* 287 Pac. 730; Italics ours.)

In *State* v. *Lewin,* 53 Kan., 679, 37 Pac. 168, the statute involved was somewhat different, but the principle was the same. The statute reads:

"Sec. 28. That in case any convict shall escape from the penitentiary, or from the custody of any officer, or to make an attempt to so escape, or shall join in any mutiny, or shall make an attempt at mutiny, or in any manner do any act to cause others to mutiny, while in confinement in the State penitentiary, or while in the custody of any officer, the said convict shall be taken by the warden before the district court of Leavenworth county, on information filed by the warden; and if the charge be sustained, *the time said convict had served in the penitentiary prior to such act as charged shall not be counted* as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the State penitentiary *for the full term for which he or she was sentenced by the court* before whom he or she was convicted and undergoing sentence at the time of the violating the provisions of this section; provided, that no limitation shall bar proceedings under this section." (*State* v. *Lewin,* 53 Kan. 679, 37 Pac. 168, 169; Italics ours.)

After holding that this statute was unconstitutional with respect to the State Constitution the Court said:

"The section is open to other serious constitutional objections. Its provisions do not commend themselves to our sense of justice. The punishment required to be imposed *is not to be measured by the offense committed,* but is made to depend wholly on the date of the sentence under which the prisoner was confined in the penitentiary at the time he committed the act for which he is punished. The court is required simply to obliterate the time that he has been confined in the penitentiary, for his original offense, and, as a punishment for the escape or mutiny, to reimpose the sentence given by the court for his prior crime. So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day, in concert, under precisely the same circumstances, and with exactly equal guilt, would receive wholly different punishment. If one had been confined but for a day, his punishment would be increased but by one day while the other, who might have been confined for

20 years, would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws? The inherent vice of such an enactment is not fully apparent until the fact is recognized that at the penitentiary, where there are no witnesses of what transpires but convicts and officers, the oath of a convict would have little weight against that of an officer, and a charge preferred and backed up by the oath of an officer would in most cases insure a conviction, thus unduly increasing the necessarily great power of the warden over the inmates under him. We are not disposed to strain our construction of constitutional safeguards to uphold such a statute. We think section 28 wholly void, and the order of the district court, quashing the information, is sustained." (*State* v. *Lewin*, 53 Kan., 679, 681, 37 Pac. 169; Italics ours.)

The reasoning of the above cases seems conclusive.

III.

The Practical Construction of the Present Statute.

The following data is submitted not to support a claim that an alleged constitutional statute has been applied in an unconstitutional way but to show that while theoretically the Court sentencing for escape need not award the full term of the original sentence in effect it nearly always does so.

Thus, in the Record of *Commonwealth ex rel Rymeus* v. *Ashe*, Miscellaneous Docket No. 821, Court of Common Pleas, Allegheny County, Pennsylvania, the following letter appears from Judge M. Ward Fleming, who sentenced the present petitioner for escaping, explaining the policy of the Court:

"Judges Chambers,
Forty-ninth Judicial District, Pennsylvania,
M. Ward Fleming, President Judge.

Bellefonte, Pa., August 18, 1934.

To the Honorable, the Judges of the Court of Common Pleas of Allegheny County, Pennsylvania.

Gentlemen:

"Since the establishment of Rockview *the policy of this Court* has been to impose upon inmates escaping therefrom, a sentence *exactly the same* as that originally imposed in the County from which they were committed, such sentence to be computed from the expiration of such original sentence. Cards are handed to the Court before sentence imposed showing such original sentence and the name of the County from which the inmate comes."

* * * *

"With kind personal regards, I am,

Sincerely yours,

M. Ward Fleming." (Italics ours)

Examination of the records of the Western Penitentiary, in which petitioner is confined, shows that of 102 prisoners sentenced for escape only three were given less than the original sentence. It is only fair however to add that three others were given less than their original sentence, but the record discloses that as to these latter three their original sentence was beyond their life expectancy. The following list shows the sentences:

Name	Original Sentence	Sentence for Escape
Frank Campos	5½ to 10 years	5 to 10 years
John Kelley	5 to 7 years	3½ to 7 years
William Wright	4 to 5 years 5 to 6 years	5½ to 11 years
Lee Barr	3 to 6 years	3 to 6 years
George D. Roberts	2 to 4 years 1 to 2 years 1 to 2 years	4 to 8 years

Name	Original Sentence	Sentence for Escape
Albert Mahorney	4 to 8 years	4 to 8 years
Michael Brown	3 to 6 years	3 to 6 years
George D. O'Connors	3 to 6 years 3 to 6 years	6 to 12 years
Charles Bisman	5 to 10 years	1 to 2 years
Jack Eastman	5 to 10 years	5 to 10 years
Elmer Weaver	2½ to 5 years 2½ to 5 years	5 to 10 years
Harry Herr	5 to 10 years	5 to 10 years
William James Wright	2 to 4 years	2 to 4 years
George Glenn Dailey	3 to 10 years	3 to 10 years
Walter Trent	10 to 20 years	1 to 20 years
Claude Boddie	6 to 12 years	1 to 20 years
Ralph Minter	4 to 8 years	1 to 2 years
Freeland Preston	2 to 4 years 2 to 4 years 2 to 4 years	1 to 2 years
James Duffy	5 to 10 years	5 to 10 years
J. S. Morrow	2½ to 5 years 1 to 2 years 1 to 2 years	4½ to 9 years
Nick Dubish	5 to 10 years	5 to 10 years
James Arco Ross	1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years	6 to 12 years
Richard E. Norman	3 to 10 years 3 to 10 years	6 to 20 years
Steve Waters	4 to 8 years 1 to 5 years	5 to 13 years
Irving Gilinsky	4 to 8 years	4 to 8 years
George Tomachesky	5 to 10 years	5 to 10 years
William Penland	6 to 12 years	6 to 12 years
Charles Elmer Ward	4 to 8 years	4 to 8 years
Frank Clarke	1½ to 3 years	1½ to 3 years
Walter Vance	3 to 6 years	3 to 6 years
Morgan Grimm	3 to 6 years	3 to 6 years
Carl White	Indefinite, 5 year maximum	2½ to 5 years
Elmer Sullivan	3 to 6 years	3 to 6 years
Fred Williams	4 to 8 years 4 to 8 years	8 to 16 years
Jack Dunn	5 to 15 years	5 to 15 years
John Pie	6 to 12 years	6 to 12 years
Thomas Lewis	5 to 10 years 5 to 10 years	10 to 20 years

Name	Original Sentence	Sentence for Escape
R. B. Canfield	2 to 4 years 2 to 4 years 2 to 4 years	½ to 1 year
Harry Lehna	18 years, 4 months to 55 years	18 to 36 years
Rafael Paschel	4 years, 10 months to 9 years, 8 months	4 years, 10 months to 9 years, 8 months
W. H. Marlin	3 to 7 years	3 to 7 years
John Hilty	3 to 6 years	3 to 6 years
Raymond Van Fossen	4 to 8 years	4 to 8 years
Joseph Cetinski	3 to 6 years	3 to 6 years
Alex Palm	2½ to 5 years	2½ to 5 years
Richard Thomas	1 to 2 years 1 to 2 years	2 to 4 years
Martin Zajac	5 to 10 years	5 to 10 years
John Griffin	1½ to 3 years	1½ to 3 years
William Meyers	5 to 10 years	5 to 10 years
William Lindsay	3½ to 7 years 3½ to 7 years	7 to 14 years
John Desimone	4½ to 7 years	3½ to 7 years
Walter Gordon	10 to 20 years	10 to 20 years
John L. Sullivan	1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years 1 to 2 years	7 to 14 years
Joe Williams	3 to 6 years	3 to 6 years
John A. McGinnis	1 to 2 years 1 to 2 years 1 to 2 years	3 to 6 years
Charles Weaver	5 to 10 years 5 to 10 years	10 to 20 years
Theodore Geisler	2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years	3 to 6 years
Frederick Prince	5 to 10 years 5 to 10 years 5 to 10 years	3 to 6 years
Edward Fatson	4 years, 7 months to 10 years	4 years, 7 months to 10 years

Name	Original Sentence	Sentence for Escape
Walter Ross	1½ to 3 years	1½ to 3 years
James Thomas	3½ to 7 years	3½ to 7 years
Lee Melzer	5 to 10 years 2 to 4 years	7 to 14 years
Jack W. Lawson	5 to 10 years	5 to 10 years
Edward J. Forstal	3 to 6 years	3 to 6 years
Thomas O'Dowd	2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years	10 to 20 years
Walter Scott	6 to 12 years	6 to 12 years
Vincent Velock	2½ to 5 years	2½ to 5 years
Louis Bankey	8½ to 17 years	8½ to 17 years
Ray White	3½ to 7 years	3½ to 7 years
Arnold Rahloff	6 to 12 years	6 to 12 years
Albert Fulmer	5 to 10 years 1 to 2 years 1 to 2 years	7 to 14 years
Wayne Daugherty	5 to 10 years	5 to 10 years
Frank Nedean	1 to 3 years 1 to 3 years 1 to 3 years 1 to 3 years 1 to 3 years	5 to 15 years
Tony Jurista	3 to 6 years 1 to 2 years 1 to 2 years 1 to 2 years	6 to 12 years
Elmer Hendershot	4 to 8 years 1 to 2 years	5 to 10 years
John Martin	5 to 10 years 5 to 10 years 5 to 10 years 5 to 10 years	1 to 2 years
James Rieg	5 to 10 years	5 to 10 years
Frank Rausch	1½ to 3 years	1½ to 3 years
Charles B. Litzinger	10 to 20 years	10 to 20 years
William Buck	5 to 10 years	5 to 10 years
Ralph Manning	5 to 10 years	5 to 10 years
David Prosser	3 to 6 years	4 to 8 years
Cecil Rice	2 to 4 years	2 to 4 years
Ray Palmer	4 to 8 years	4 to 8 years
Jesse Neff	4 to 5 years	2½ to 5 years
Joseph W. Weicht	2 to 4 years	2 to 4 years
John Wesoloski	3 to 6 years	3 to 6 years
Charles McLean	2 to 4 years 2 to 4 years 2 to 4 years	6 to 12 years

Name	Original Sentence	Sentence for Escape
James Meachen	3 to 6 years 3 to 6 years 3 to 6 years	9 to 18 years
Leo Stiles	1 to 5 years	1 to 5 years
John P. Johnston	3 to 6 years	3 to 6 years
Paul Broadwater	1 to 2 years	1 to 2 years
William Isett	5 to 10 years	5 to 10 years
George Bruner	3 to 6 years 3 to 6 years	6 to 12 years
George Baughtman	3 to 6 years 2 to 4 years 2 to 4 years 2 to 4 years 2 to 4 years 1 to 2 years	12 to 24 years
George Penrod	3 to 6 years	3 to 6 years
Willard Malarchy	3 to 6 years	3 to 6 years
George W. Trost	2½ to 5 years 4 to 8 years 4 to 8 years	4 to 8 years
Frank Leput	2 to 4 years 3 to 6 years	5 to 10 years
Homer Hoon	3½ to 7 years	3½ to 7 years
John Short	2 to 4 years	2 to 4 years
Fred Warner	3 to 10 years	3 to 10 years

It will be seen from the above that the Pennsylvania Courts in sentencing prisoners for escape have taken the provisions of the escape statute at their face value and have either felt themselves bound by the original sentence when arriving at the quantum of the escape sentence, or, as suggested by counsel herein, have properly considered that if any discretion be confided to them under the Escape Statute such discretion must be exercised within the facts and circumstances shown as to the escape itself. This data is proof that the sentence for the original offense is not a mere guide but a shackle. As the original sentence was the result not only of the facts and circumstances of the original case, but of the possible necessity of making an example by a heavy sentence as a deterrent to a prevalent form of crime, it follows that all of these elements leading up to the original sentence are read into the escape

statute and result, through the trial Judge's ignorance of what actually led to the quantum of the original sentence, in a haphazard classification for the escape sentence.

It follows that under *Barbier* v. *Connolly*, 113 U. S., 27, equal protection and security have not been given even to escaping convicts "under like circumstances". The only circumstances known to the Court trying a convict for escape are the circumstances of the escape itself, and if the escape statute renders convicts "under like circumstances", i.e., escaping together, punishable by different sentences dependent upon outside earlier happenings of which the Court is ignorant, it would seem that the classification is clearly unreasonable and arbitrary within the meaning of the Equal Protection Clause.

IV.

Escape Laws of Other States.

The following data is submitted as an indication of the unusual character of the Pennsylvania statute, and of the tacit or unconscious disapproval of it among the overwhelming number of other States.

Analysis of State Laws Pertaining to Escape.

State	Sentence	Authority
Alabama	3 months to 1 year	Alabama Code of 1928, Sec. 4012; (1933, P. 627, Sec. 2)
Arizona	For felony, not to exceed 5 years; for misdemeanor, not to exceed 6 months	Revised Code of 1928, Struckmeyer, Sec. 4539 and Sec. 4485.
Arkansas	Escape from penitentiary, 30 days to 5 years; from custody or place of confinement, fine of $50 and imprisonment of 6 months	Digest of Statutes, Crawford & Moses, Sec. 2575 and Sec. 2579.
Georgia	Three months to 4 years	Parks Annotated Code, Vol. 6 (1914), Sec. 321 (sec. 319); Sec. 319 (sec. 314).
Illinois	1 to 10 years	Annotated Statutes, Smith-Hurd, Vol. 5, Chap. 118, sec. 18.

State	Sentence	Authority
Iowa	Not to exceed 5 years, commencing with expiration of original sentence	Code of Iowa, 1931, Sec. 13-351; (S. 13, sec. 4897-a; C 24, 27, sec. 13351).
Kentucky	Not exceeding 6 years, after original sentence	Carrals' Kentucky Statutes, 1930, p. 741, Sec. 1232.
Louisiana	Imprisonment or fine or both at discretion of court	Code of Criminal Procedure, Dart, 1932, Sec. 923.
Mississippi	Not to exceed 5 years commencing after expiration of original sentence	Code, 1930, Annotated, p. 565, Sec. 909.
Montana	1 to 10 years commencing after expiration of original sentence	Revised Codes of Montana, 1935, Sec. 10867.
Nebraska	1 to 10 years	Compiled Statutes, 1929, Sec. 28-736.
Nevada	Offense of escape a misdemeanor, no definite sentence	Compiled Laws, 1929, Hillyer, Vol. 5, p. 3063, Sec. 10023.
New Mexico	Not less than 25 years, nor more than 50 years	Annotated Statutes, 1929, Sec. 75-133.
North Carolina	Offense of escape a misdemeanor	Annotated Code, 1931, Sec. 4404; Supplement, 1933, Sec. 7748 (V).
Oregon	Offense of escape a felony, punishment not to exceed 10 years	Code Annotated, 1930, Vol. 1, p. 1313, Sec. 14-418.
South Dakota	Offense of escape a felony, punishment not to exceed 5 years	Compiled Laws, 1929, Vol. 1, p. 1113, Sec. 3732.
Tennessee	Not to exceed 5 years commencing after expiration of original sentence	Code of Tennessee, 1932, Williams, Shannon, Harsh, Sec. 12151; Sec. 12154.
Vermont	Imprisonment not more than 5 years, fine not more than $500	Public Laws, 1933, Sec. 8671.
Virginia	Punishment not exceeding one year	Annotated Code of 1930, Sec. 4507; Sec. 4508.
West Virginia	Not less than 1 nor more than 5 years	Official Code, 1931, p. 1529, Art. 8, Sec. 1; Art. 8, Sec. 2.
Wyoming	1 to 10 years	Revised Statute, 1931, Sec. 32-823.
California	Offense a felony, punishment not exceeding 10 years and a fine not exceeding $10,000	Penal Code, Deering, 1931, Chapter III, p. 55, Sec. 105; Sec. 106; Sec. 107.

State	Sentence	Authority
Connecticut	Escape from State prison, not exceeding 10 years; from county jail or work house, not exceeding 5 years; attempt with violence not exceeding 10 years	General Statutes of Connecticut, Revision of 1930, Chapter 326, Sec. 6173; Sec. 6175; Sec. 6178.
Delaware	Not exceeding 1 year	Revised Code of Delaware, 1935, Sec. 18; Sec. 4135.
Florida	Not exceeding one year	Compiled General Laws of Florida, 1927, Sec. 8588, (6250).
Idaho	Offense a felony if original offense a felony; offense a misdemeanor if original offense a misdemeanor; punishment for felony not exceeding 5 years or fine not exceeding $5,000 or by both; punishment for misdemeanor not exceeding 6 months, or fine not exceeding $800, or by both	Annotated, Vol. 1, p. 956, (1932), Sec. 17-803; Sec. 17-804; Sec. 17-112; Sec. 17-113.
Indiana	Imprisonment not exceeding the length of time for which such escaping convict was originally sentenced, to commence from expiration of original term of imprisonment	Burns, Indiana Statutes Annotated, 1933, Vol. 4, St. 2609. 10-1807; 10-1808, (2610).
Kansas	5 years	General Statutes Annotated, Corrick, 1935, Chap. 21, Art. 7; Sec. 21-733; Sec. 21-732; Sec. 21-734; Revised Statutes, 1923, Sec. 210732, Sec. 21-734.
Maine	Offense a felony, punishment one to seven years; as for any other offense not more than 11 months	Revised Statutes of Maine, 1930, Chap. 133, p. 1565, Sec. 16, R. S. c. 124, Chap. 152, Sec. 45, R. S. c. 142.
Maryland	18 months to 10 years	Annotated Code of Maryland, Bagby, Vol. 1, p. 1013, Art. 27, Sec. 138.
Massachusetts	Not exceeding 5 years	General Laws of Massachusetts, Tercentenary Ed., 1932, Vol. II, p. 3154, Chap. 268, Sec. 16, Amendment, 1934.
Michigan	Not more than 3 years	Compiled Laws of State of Michigan, 1929, Vol. 3, p. 5809, Law 16586, Sec. 24.

State	Sentence	Authority
Minnesota	Where offense a felony, punishment 1 to 7 years; for gross misdemeanor, punishment not more than 1 year or fine of not more than $1000; misdemeanor not more than 3 months, or fine of not more than $100; where force or violence is used, punishment not exceeding 5 years	Mason's Minnesota Statutes, 1924, Vol. 2, Chap. 96, p. 1980, Sec. 10007; Sec. 10008; Chap. 106, p. 2097, Sec. 10867; Chap. 93, p. 1966, Sec. 9921; Sec. 9923; Sec. 9922; Sec. 3917; Sec. 3918.
Missouri	Breaking prison, punishment not exceeding 5 years; escape punishment not exceeding 3 years; prison break from county jail not exceeding 3 years	Revised Statutes of Missouri, 1929, Vol. I, chap. 30, p. 1112, Sec. 3912; Sec. 3913; Sec. 3914; Sec. 3915; Sec. 3916.
New Hampshire	Not more than 6 months, without affecting first sentence; use of violence punishment 6 months to 10 years	Public Laws of New Hampshire, 1926, Vol. II, Chap. 400, p. 1533; Sec. 13, Sec. 14; chap. 399, p. 1524, Sec. 8.
New Jersey	Offense a misdemeanor	Cumulative Supplement to Compiled Statutes, Vol. 1, p. 835. Crimes 52-12; Compiled Statutes, 1709-1910, Vol. 3, p. 2953, Sec. 38.
New York	Offense a felony, if original offense a felony; a misdemeanor, if original offense a misdemeanor; life term prisoner attempting or escaping by force or fraud is guilty of felony; punishment for felony 1 to 7 years	McKinney's Consolidated Laws of New York, Anno. Book 39, Penal Law, p. 587; Sec. 1694; Sec. 1695; Sec. 1699.
North Dakota	For a felony punishment not exceeding $1000 fine or 1 to 5 years, or both; for a misdemeanor, punishment not exceeding 1 year or fine not exceeding $500 or both	Compiled Laws of North Dakota, 1913, Vol. II, Penal Code, Chap. 12, Sec. 9351; Sec. 9352; Sec. 9353; Sec. 9204; Sec. 9206.
Ohio	Not less than 1 year nor more than 10 years	Page's Annotated General Code, Vol. 2, p. 5571, Offenses against Public Justice, Tit. I, Chap. 8, Sec. 12840; Sec. 12831.
Oklahoma	5 years;	Act approved May 8, 1935, Senate Bill No. 276;
	If with force and violence double the original sentence	Sec. 2053, Oklahoma Code, (Harlow).

State	Sentence	Authority
Rhode Island	Not more than 3 years or fine not more than $500	General Laws of Rhode Island, Chap. 394, p. 1687, Title 39 (1923), Sec. 6002; Amended 1931; Sec. 27; Sec. 6003.
Utah	Not more than 10 years	Revised Statutes of Utah, 1933, Chap. 48, Penal Code, Sec. 103-48-2; Sec. 103-48-3; Sec. 103-1-16.
Washington	For a felony, not more than 10 years nor fine exceeding $5000 or both; for a misdemeanor, not more than 90 days or fine of more than $250	Remington's Compiled Statutes of Washington, 1922, Vol. 1, Sec. 2342; Sec. 2265; Sec. 2266.
Wisconsin	Escape from state prison, not more than 10 years; from reformatory, house of correction, not more than 30 days	Wisconsin Statutes, 1935, Sec. 346, 40; Sec. 346, 45.

It will be seen from the above that the maximum sentence under the most drastic State laws is ten years. Eleven States have a maximum of ten years; fifteen States have a maximum of five years; five States have a maximum of one year; nine States vary in punishment from three months to a maximum of seven years; three States merely make the offense a misdemeanor, and one State, New Mexico, provides a twenty-five to fifty year penalty applicable only where the escape is executed with explosives or deadly weapons. Apparently there are no escape statutes in Colorado, South Carolina or Texas. Aside from Idaho, Kansas and Oklahoma, whose statutes have already been held unconstitutional in the cases cited under Point II herein, no State has adopted the peculiar classification of the Pennsylvania statute herein involved. It is, of course, conceded that a State, within all but outrageous limits, can make the punishment for an offense what it likes. However, it seems significant to counsel, from an examination of the various State statutes, that while some of them make the sentence light and others make it heavy they all make it certain. Where the sentence is discretionary there is no indication

that the discretion to be exercised is any other form of discretion than that ordinarily exercised by a Court acting according to the facts and circumstances of the particular case. In no instance is the amount of the sentence made dependent upon any outside occurrence or prior happening.

If it seems reasonable, from the argument herein, that the purported classification herein is arbitrary, it would seem to be no answer to argue that the original sentence on which the culprit was first imprisoned was a mere conditional sentence dependent upon non-escape, and that hence the prisoner was on notice that if he escaped he might be compelled to serve double the original sentence. We think such a contention would reduce itself to the argument that an unreasonable classification and an unequal statute would be rendered reasonable and equally operative by giving notice of it beforehand to those affected. Such an argument would seem illogical, and would make any classification, however unreasonable, valid by the device of notice beforehand. Particularly would this be so in the present case wherein the notice would be that imperfect form of notice achieved by the fiction of law that the statute having been written upon the statute books, all must be presumed to have read it.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

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No. [redacted] 25

In the Supreme Court of the United States

October Term, 1936

COMMONWEALTH OF PENNSYLVANIA, EX REL.,
ELMER SULLIVAN, Petitioner

v.

STANLEY ASHE, Warden
State Penitentiary, Western District of Pennsylvania

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1936

No. 878

COMMONWEALTH OF PENNSYLVANIA, EX REL.,
ELMER SULLIVAN, Petitioner

v.

STANLEY ASHE, Warden
State Penitentiary, Western District of Pennsylvania

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania (R. 33-37) is reported in 188 Atlantic Reporter 841.

JURISDICTION

The opinion of the Supreme Court of Pennsylvania was filed January 11, 1937. The petition for writ of certiorari was filed April 9, 1937. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is Section 3 of the Act of Assembly of Pennsylvania of March 31, 1860, P. L. 382, which provides, inter alia, that a prisoner serving a sentence in the penitentiary or jail, who breaks such penitentiary or jail, is guilty of a misdemeanor, and upon conviction shall be sentenced to undergo an imprisonment to commence from the expiration of, and for a period of time not exceeding the original sentence by virtue of which he had been imprisoned, unconstitutional by reason of offending the equal protection clause of the fourteenth amendment?

STATUTE AND OTHER AUTHORITY INVOLVED

The applicable provisions of the statutes and other authorities involved, will be found in the appendixes. (A and B, infra, PP.)

STATEMENT

This case arose through a petition filed in the Supreme Court of Pennsylvania by the petitioner for a writ of habeas corpus. The Supreme Court, exercising its original jurisdiction, granted a rule to show cause why such writ should not be granted.

From the petition for habeas corpus (R. 1-14), it appears that the petitioner had originally been sentenced, on April 26, 1929, to serve a term of 3 to 6 years in the Western State Penitentiary. It further appears that on December 28, 1931, petitioner escaped from said prison and was subsequently recaptured. Pursuant to indictment found, the petitioner on December 31, 1931 was sentenced for said breaking of prison to a term of not less than 3 years, nor more than 6 years, to be computed from the expiration of the original sentence.

The petition alleged that the petitioner was illegally confined and unlawfully restrained of his liberty. The Supreme Court of Pennsylvania, in discharging the rule, held that the only question before it was whether or not Section 3 of the Act of March 31, 1860, P. L. 382, was unconstitutional as depriving the petitioner of the equal protection of the laws guaranteed by the fourteenth amendment of the Constitution of the United States, and decided (R. 33-37) that the said section did not contravene the amendment. The Pennsylvania act in question provides, in effect, that any prisoner imprisoned in any penitentiary or jail who breaks such penitentiary or jail shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment to commence from the expiration of his original sentence for a period of time not exceeding the original sentence by virtue of which he was imprisoned when he so broke prison.

ARGUMENT

The Supreme Court of Pennsylvania in its opinion (R. 33-37) succinctly states the question involved to be "* * * whether a statute adopts an unreasonable classification when, in providing for the sentencing of persons who commit identical crimes, it authorizes the imposition of a severer sentence upon one who had previously offended more grievously than another."

The mere fact that a judge sentences differently one criminal committing the same kind of crime—or even the same crime—from others, has never been regarded as a violation of the equal protection clause of the fourteenth amendment.

This has been settled by the United States Supreme Court in the case of HOWARD ET AL *v.* STATE OF NORTH CAROLINA, 191 U. S. 126 (1903), 48 L. ed. 121. In that case three persons were convicted of the crime of conspiracy to defraud. Upon conviction, two were given ten years' sentence of imprisonment and the third only seven years. The court in holding that this was no denial of the equal protection clause, said on page 136:

> * * * Doubtless there were sufficient reasons for giving to one of the conspirators a less term than the others. At any rate, there is no such inequality as will justify us in setting aside the judgment against the two.

Criminals classify themselves not merely by the kind of crime they commit, but the manner in which they commit it. Cases applying this familiar doctrine of classification are those upholding the habitual criminal statutes, such as GRAHAM *v.* WEST VIRGINIA, 224 U. S. 616 (1921), 56 L. ed. 917, where Chief Justice Hughes said, at page 630:

> * * * The statute in question applied to all those "convicted of an offense, and sentenced to confinement therefor in the penitentiary," who previously have been sentenced to a like punishment. **The fact of such sentence, indicating the gravity of the offense, affords a reasonable basis for classification.** * * * (Boldface ours.)

Again on page 630 the court stated:

> The 14th Amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." * * *

See also the case of MOORE *v.* STATE OF MISSOURI, 159 U. S. 673 (1895), 40 L. ed. 301, involving the constitutionality of the Missouri habitual criminal statute where the court said at page 677:

> The reason for holding that the accused is not again punished for the first offense is given in Ross Case by Chief Justice Parker, that "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself;" * * *

Classifying the punishment of offenses by previous punishment is not in and of itself arbitrary. It takes no great stretch of the imagination to realize that a person serving a long period of imprisonment who escapes is potentially more dangerous a person at large than one who is serving a shorter period of sentence connoting a lesser crime or less aggravating circumstances. The very crime of escape committed by the person serving a long term is more serious in its effect upon law abiding citizens in the fear that it imposes upon them. It is common knowledge that such per-

sons have more to lose by their recapture and hence are more apt to disregard life and property than others.

Further, the opinion of the Supreme Court of Pennsylvania (R. 33-37) in dismissing the petition for the writ conclusively sets out the controlling authorities for determining the constitutionality of the statute in question.

For the purposes of brevity, respondent relies upon the opinion of the Supreme Court of Pennsylvania and the authorities therein cited, and does not attempt to reiterate such authorities.

CONSIDERATION OF CASES CITED IN THE PETITIONER'S BRIEF

The petitioner's brief cites three cases on escape statutes in other states. In two of them, the escape statute committed no discretion to the judge, but compelled him to impose a sentence equal to that which the prisoner was serving at the time of his escape. Thus, in RE MALLON, 16 Idaho 737 (1909), the escape statute provided:

> * * * 'Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.'

The court construed this statute to require the imposition of a sentence equal to that which the prisoner was serving. There was no discretion in the sentencing court. The distinction between that law and the Pennsylvania law is too obvious for extended comment.

In STATE *v.* LEWIN, 53 Kansas 679 (1894), the escape statute provided that, the time that the said convict had served in the said penitentiary prior to the escape:

> * * * shall not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the state penitentiary for the full term for which he or she was sentenced by the court * * *

Here again there was no discretion vested in the court sentencing the escaped prisoner. The court was bound to resentence a prisoner to the same term of his original offense regardless whether he had served one day or nearly all of it at the time of his escape.

Again the distinction between that law and the one of this State needs no comment.

The third case is the case of STATE *v.* JOHNSEY, 46 Okla. Criminal Reports 233 (1930), in which case was involved a statute punishing escape by imprisonment in said prison for a term not exceeding double the term for which the prisoner was sentenced when he escaped. The escape law construed in that case did allow the same discretion to be found in our Pennsylvania statute. The court there, however, merely following the case RE MALLON and KANSAS *v.* LEWIN, supra, declared the act unconstitutional, and despite the obvious distinction between the respective statutes, gave no consideration to the discretion left to the trial court.

Reference is made to petitioner's cases solely because petitioner in citing said cases as authority assumes that the statutes in the three states were identical to the Pennsylvania act.

CONCLUSION

Respondent respectfully points out that the only matter which was properly before the Supreme Court of Pennsylvania was the question of the constitutionality of Section 3 of the Act of March 31, 1860, P. L. 382. There was no question raised in the petition for habeas corpus concerning the unconstitutional application of an otherwise constitutional statute. Therefore, such question is not properly before this Court.

The opinion of the Supreme Court of Pennsylvania is correct and is in accord with the decisions of this Court which we deem pertinent to the issue presented.

The petition should be denied.

Respectfully submitted,

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APPENDIX A

PENNSYLVANIA STATUTE

Act of March 31, 1860, P. L. 382:

Section 3. If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; **if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him.** (Boldface ours.) (18 Purdon's Pennsylvania Statutes Annotated 251).

APPENDIX B

AMENDMENT 14 OF THE CONSTITUTION OF THE UNITED STATES.

Section 1—Citizenship—Due Process—Equal Protection * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the law.

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No. 25

In the Supreme Court of the United States

October Term, 1937

No. 25

COMMONWEALTH OF PENNSYLVANIA, EX REL. ELMER SULLIVAN, Petitioner

v.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA, Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR RESPONDENT

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INDEX

	Page
Opinion of the Court Below	1
Jurisdiction	2
Statute Involved	2
Counterstatement	3
Summary of Argument	4
Argument	5
Conclusion	17

TABLE OF CASES

Bachtel *v.* Wilcox, 204 U. S. 36	6
Clifford, ex parte, 29 Ind. 106	16
Coler *v.* Corn Exchange Bank, 250 N. Y. 136, 164 N. E. 882	17
Colgate *v.* Harvey, 296 U. S. 404	5
Converse, In re, 137 U. S. 624	8
Commonwealth *v.* Adams, 3 Pa. Super. 167	16
Finley *v.* California, 222 U. S. 28	9
Finley, In re, 1 Cal. App. 198, 81 Pac. 1041	16
Graham *v.* State of West Virginia, 224 U. S. 616	7
Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592	6
Howard, et al *v.* State of North Carolina, 191 U. S. 126	6
Huyser *v.* Commonwealth, 116 Ky. 76 S. W. 174	9
Ingalls *v.* State of Wisconsin, 48 Wis. 647, 4 N. W. 785	9
Kelley *v.* Meyers, 124 Ore. 322, 263 Pac. 903	10
Leeper *v.* Texas, 139 U. S. 462	8
Lindley *v.* National Carbonic Gas Company, 220 U. S. 61	5
Louisville and Nashville R. R. Co. *v.* Melton, 218 U. S. 36	6
McDonald *v.* Massachusetts, 180 U. S. 311	9
Mallon, In re	10-11
Missouri *v.* Lewis, 101 U. S. 22	8
Moore *v.* Missouri, 159 U. S. 673	8
Munn *v.* Ill, 94 U. S. 113	6

Page

Old Dearborn Distributing Company *v.* Seagram Distilling Corp., 229 U. S. 183 5

Owenbey *v.* Morgan, 256 U. S. 94 17

Ozark Lumber Co. *v.* Union County Bank, 207 U. S. 251 6

Pace *v.* Alabama, 106 U. S. 583 8

People *v.* Coleman, 145 Cal. 609, 79 Pac. 283 9

State *v.* Lewin, 53 Kan. 679, 37 Pac. 168 11

Ughbanks *v.* Armstrong, 208 U. S. 481 (1908) 6

STATUTES CITED

Judicial Code, Sec. 237 (b) as amended by Act of February 13, 1925 2

Pennsylvania Act Mar. 31, 1860, P. L. 382, Sec. 3 2-6-13

California Penal Code 9

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Supreme Court of the United States

October Term, 1937

No. 25

COMMONWEALTH OF PENNSYLVANIA, EX REL ELMER SULLIVAN, Petitioner

v.

STANLEY ASHE, WARDEN, STATE PENITENTIARY, WESTERN DISTRICT OF PENNSYLVANIA, Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 325 Pa., 305, 188 Atl. 841 (1937).

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that there is drawn in question the validity of a statute of the Commonwealth of Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the United States.

The judgment below was rendered and filed January 11, 1937, (R. 22). Petition for a writ of certiorari was filed herein April 9, 1937, and the petition granted May 17, 1937, (R. 27).

STATUTE INVOLVED

The Act of 1860, March 31, P. L. 382, Section 3, reads:

"ESCAPE OR RESCUE OF PRISONERS—ESCAPE AND BREAKING PRISON.—If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such person shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable on conviction by simple imprisonment without labor; *if any prisoner imprisoned in any penitentiary or jail, upon a conviction for a criminal offense, other than murder in the first degree, or where the sentence is.*

for imprisonment for life shall break such penitentiary or jail, although no escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him. (1860, March 31, P. L. 382, Sec. 3)"
(Italics ours)

COUNTER STATEMENT

This case arose through a petition filed in the Supreme Court of Pennsylvania by the petitioner for a writ of habeas corpus. The Supreme Court, exercising its original jurisdiction, granted a rule to show cause why such writ should not be granted.

From the petition for habeas corpus (R. 1-14), it appears that the petitioner had originally been sentenced, on April 26, 1929, to serve a term of 3 to 6 years in the Western State Penitentiary. It further appears that on December 28, 1931, petitioner escaped from said prison and was subsequently recaptured. Pursuant to indictment found, the petitioner on December 31, 1931 was sentenced for said breaking of prison to a term of not less than 3 years, nor more than 6 years, to be computed from the expiration of the original sentence.

The petition alleged that the petitioner was illegally confined and unlawfully restrained of his liberty.

The Supreme Court of Pennsylvania, in discharging the rule, held that the only question before it was whether or

not Section 3 of the Act of March 31, 1860, P. L. 382, was unconstitutional as depriving the petitioner of the equal protection of the laws guaranteed by the fourteenth amendment of the Constitution of the United States, and decided (R. 33-37) that the said section did not contravene the amendment. The Pennsylvania Act in question provides, in effect, that any prisoner imprisoned in any penitentiary or jail who breaks such penitentiary or jail shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment to commence from the expiration of his original sentence for a period of time not exceeding the original sentence by virtue of which he was imprisoned when he so broke prison.

SUMMARY OF ARGUMENT

1. The Fourteenth Amendment, in granting the equal protection of the laws, does not require a mathematical nicety but permits the state legislature to make a reasonable classification in its statutes.

2. The legislature, in providing that the trial court may impose a maximum sentence as long as the term of the original sentence, makes a reasonable classification.

ARGUMENT

The particular amendment to the United States Constitution, invoked herein by the petitioner, has so often been construed by the United States Supreme Court that no question can reasonably arise as to its meaning. In OLD DEARBORN DISTRIBUTING COMPANY *v.* SEAGRAM DISTILLERY CORP., 299 U. S. 183, 197, 57 S. Ct. 139, 146 (1936) Mr. Justice Sutherland remarked,

> "As this court many times has said the equal protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' COLGATE *v.* HARVEY, 296 U. S. 404, 422, 423, 56 S. Ct. 252, 255, 256, 80 L. Ed. 299, 102 A. L. R. 54, and cases cited."

In any case where it is contended that a state statute denies the equal protection of the laws, it may be helpful to refer to LINDLEY *v.* NATIONAL CARBONIC GAS COMPANY, 220 U. S. 61 (1911) where Mr. Justice Van DeVanter stated that,

> "The rules by which this contention must be tested, as is shown by repeated decisions of the court are these:
>
> (1) The equal protection clause of the fourteenth amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> (2) A classification having some reasonable basis does not offend against that clause merely because it is

not made with mathematical nicety or because in practice it results in some inequality.

(3) When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

(4) One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. BACHTEL *v.* WILCOX, 204 U. S. 36, 41; LOUISVILLE AND NASHVILLE R. R. CO. *v.* MELTON, 218 U. S. 36; OZARK LUMBER CO. *v.* UNION COUNTY BANK, 207 U. S. 251, 256; MUNN. *v.* ILL., 94 U. S. 113, 132; HENDERSON BRIDGE CO. *v.* HENDERSON CITY, 173 U. S. 592, 615." (p. 79)

Tested by the application of these rules, sec. 3 of the Act of Pennsylvania of March 31, 1860, P. L. 382 will be found to be consistent with the requirements of the fourteenth amendment.

Although no statute identical with the one here attacked has ever been passed on by the United States Supreme Court, others involving substantially similar principles have been scrutinized and upheld. Thus, it has long been held that there is no violation of the equal protection clause of the Fourteenth Amendment where individual offenders having committed the same offense are given different sentences. HOWARD ET AL *v.* STATE OF NORTH CAROLINA, 191 U. S. 126 (1903). So too, a statute providing for the imposition of indeterminate sentences in punishing those convicted has been held constitutional. UGHBANKS *v.* ARMSTRONG, 208 U. S. 481 (1908). Further, the Supreme Court has sanctioned the reference to the criminal's past record of offenses as a basis for classification by state legislatures. In UGHBANKS *v.* ARMSTRONG, supra, the Michigan statute provided

that as to a prisoner twice convicted of felony there should be no privilege of parole. In holding this to be a reasonable classification, the court stated that the fourteenth amendment,

> "was not intended to, and does not limit the powers of the state in dealing with crimes committed within its own borders or with the punishment thereof, although no State can deprive particular persons or classes of persons of equal and impartial justice under the law." (p. 487.)

Perhaps the most striking illustration of the availability of the past history of the offender as a basis for a reasonable classification by the legislature in prescribing a punishment for criminals is the habitual offender statute. In the language of Mr. Justice Stern, writing for the Pennsylvania Supreme Court in the instant case,

> "The most reliable guide to a judicial solution of the legal problem here presented is that offered by the decisions of the courts sustaining habitual criminal acts. In GRAHAM *v.* STATE OF WEST VIRGINIA, 224 U. S. 616, 623, upholding such a statute, the Supreme Court of the United States said: 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts if similar import in many States. This legislation has uniformly been sustained in the state courts, * * * and it has been held by this court not to be repugnant to the Federal Constitution.' It was also said (p. 630) that 'The fact of such [prior]

sentence, indicating the gravity of the offense, affords a reasonable basis for classification.'

In MOORE *v.* MISSOURI, 159 U. S. 673, such a statute was attacked on the ground that it prescribed different punishment for different persons for committing the same offense. The Supreme Court pointed out that the punishment for the later offense was rendered more severe only in consequence of the defendant's previous conduct. The court said (p. 677): 'Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, convicted as he had been, would be subjected to the like punishment. The Fourteenth Amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances": MISSOURI *v.* LEWIS, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State: IN RE CONVERSE, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated: PACE *v.* ALABAMA, 106 U. S. 583; LEEPER *v.* TEXAS, 139 U. S. 462.'

> An habitual criminal statute of Massachusetts was held constitutional in McDONALD *v.* MASSACHUSETTS, 180 U. S. 311, of Wisconsin in INGALLS *v.* STATE OF WISCONSIN, 48 Wis. 647, 4 N. W. 785; of New York in PEOPLE *v.* SICKLES, 156 N. Y. 541, and of California in PEOPLE *v.* COLEMAN, 145 Cal. 609, 79 Pac. 283. In the last named case it was said: 'Penal laws are not so much for the punishment of the offender as for the protection of society, and experience has shown that the persistent and hardened offender is more dangerous to society than a person who has committed but one offense, and that a severer punishment is demanded in such case, the better to protect society." (pp. 308, 309.)

Moreover, in FINLEY *v.* CALIFORNIA, 222 U. S. 28 (1911) the United States Supreme Court upheld a classification based upon the term served by prisoners. Section 246 of the Penal Code of California inflicted a death penalty for assault with intent to kill committed by life time convicts in state prisons. It is significant that Mr. Justice McKean, by direction of court filed a *memorandum* opinion holding the classification reasonable and the statute constitutional.

These cases lead to the conclusion that the United States Supreme Court has consistently held that the past history of the offender may be the basis for a reasonable classification. And, more than one state court has upheld legislation providing for the imposition of a severer sentence on one who had committed a prior crime of the same nature. Illustrative are HUYSER *v.* COMMONWEALTH, 116 KY. 410, 76 S. W. 174 (1903) : PEOPLE *v.* SICKLES, 26 App. Div. 470, 50 N. Y. S. 377 (1898).

In dealing with the problem of the imposition of punishment for escape or aiding prisoners to escape, legislatures have more than once attempted to classify by referring to the prison sentence served by the escaped criminal. Thus,

in KELLEY *v.* MEYERS, 124 Ore. 322, 263 Pac. 903 (1928), such a statute was held constitutional. New York is another state which imposes punishment for aiding the escape of a criminal on the basis of the nature of the offense for which the escaped convict was originally incarcerated (see sec. 1696, N. Y. Penal Law).

The petitioner relies on three state decisions, as supporting his position that the present statute is unconstitutional. Two of these are clearly distinguishable. The third is ill-advised. Thus, in the leading case of IN RE MALLON, 16 Idaho 737, 102 Pac. 374 (1909) the statute involved provided,

> "Every state prisoner confined in the state prison for a term less than for life, who escapes therefrom is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." (Sec. 6452, revised codes of Idaho.)

The court held that the statute was in violation of the Fourteenth Amendment. The distinction between that statute and the Pennsylvania statute is obvious. No discretion is there permitted the judge in imposing sentence for the commission of the offense of escape. Moreover, the court which declared the Idaho statute unconstitutional emphasized that distinction:

> "It is argued by the Attorney General that a critical examination of this statute will lead to the conclusion, that the legislature, in prescribing the punishment for escape, intended to fix the maximum penalty to be inflicted at not to exceed the term which the convict was serving at the time of his escape, and to leave to the discretion of the trial court the punishment not exceeding the maximum * * *" *To give this construction to*

> *this statute it seems to us would be to legislate upon the subject, and supply what we might conceive to be necessary in order to sustain the constitutionality of the statute.* If this be the rule which would guide courts in determining the constitutionality of a statute, the court would have little difficulty in sustaining all legislative acts, because they might supply all such defects or alterations by judicial legislation. We, however, must take this statute as it reads, and when so taken, the punishment is fixed arbitrarily, and is not in any sense left to the discretion of the trial court. * * *" (16 Idaho 737 at 749, 750, 102 Pac. 374, at 377, 378.) (Italics added.)

The MALLON case, therefore, if of any authority on the question here involved, must be regarded as supporting the position of the respondent.

In the other case, STATE *v.* LEWIN, 53 Kan. 679, 37 Pac. 168, the statute also imposed a term equivalent to that being served by the escaping prisoner. Not only was that statute distinguishable from the Pennsylvania Act but it is important to note that the statute was declared unconstitutional as being in violation of the state constitution, so that anything said by the court in reference to the effect of the Fourteenth Amendment of the United States Constitution may be disregarded as pure *dictum,* [twice removed]. The third case, STATE *v.* JOHNSEY, 46 Okla. Cr. App. 233, 287 Pac. 729, dealt with a statute similar to that involved herein. There, the statute fixed a maximum only. The court held that it was unconstitutional as being in violation of the fourteenth amendment, relying on IN RE MALLON. It is submitted, that all three opinions are of little authority. The first two contain only *dicta,* and the third is incorrect for reasons already adverted to and following.

In permitting a judge to impose a maximum not exceed-

ing the term of the original sentence, the present statute makes a reasonable classification. In the language of Mr. Justice Stern, speaking for the court below:

> "The real question is whether a statute adopts an unreasonable classification when, in providing for the sentencing of persons who commit identical crimes, it authorizes the imposition of a severer sentence upon one who had previously offended more grievously than another. The answer would seem to be obvious. Probably every day, in every criminal court in the country judges impose unequal sentences upon defendants who have committed the same offense but where their former records of crime are different. If judges are properly permitted to exercise such discretion, certainly the legislature by a general statute can enact into law the expression of a similar policy.
>
> "The classification effected by the act here under attack is justified. The longer the sentence which is being served by a prisoner, the greater his temptation to seek to escape, and the greater therefore the penalty which must be imposed in order to act as an effective deterrent. Furthermore, the breaking from prison of one who is serving a long sentence, and therefore presumably has been guilty of a serious crime, involves a greater potential danger to society than the escape of a petty offender. Against a greater menace society is warranted in seeking a larger measure of protection.
>
> "The time has long passed in the development of penology when it was considered that a given punishment should automatically attach to a given crime. Penology is not, and probably never can become, an exact science. Sentencing criminals is a sociological problem, and as such demands a wide range of adaptation to social needs in the treatment of individual cases." (pp. 307, 308)

Other expressions of the unanimous recognition on the part of the practical criminologist that there is no complete similarity between individuals committing the same anti-social act may be found in Metcalf, *Recidivism and the Courts,* (1935), 26 Journal Criminal Law 367, 369 and Harno, (1936), *Rationale of a Criminal Code,* 85 U. of P. L. Rev. 549, 555. In the latter article it is stated:

> "Closely associated with the position that the basic aim of the criminal law is the protection of society is the doctrine of individualization of punishment. This doctrine involves dealing with the offender according to the risk he creates for society; it requires that the nature of the punishment be determined by the nature of the individual. Under it, the criminal is dealt with on the basis of his present and potential dangers to society, and only when he is judged a safe risk is he released."

The Pennsylvania Statute is an attempt on the part of the legislature to vest the power of punishing individual criminals within the discretion of the judge in order to bring about the best result from the standpoint of the offender and society as a whole. In the report of the commissioners who drafted the Pennsylvania Criminal Code of 1860, it was stated:

> "The provisions of this section and section 253-255-257-260, of this title are new to our statute law, although punishable at common law. They will be found to provide against a series of offense which either defeat or seriously impede the administration of criminal justice. A wide range of discretion in the punishment of these crimes is necessarily given to the courts, because they are so varied in their nature, and so different in their intrinsic magnitude, that it would be impossible to make even an approximate approach to the extent of penalty which should be applied to each particular

case as it arises. The common-law punishments now attached to them, of fine and imprisonment, have no limits other than the discretion of the court. Those prescribed by these sections restrain this general power as far as it has seemed to us to be judicious or practicable. The only existing statutory penalties against these crimes are found in the thirty-first and thirty-second sections of the act of 1790, April 5, 2 Sm. L. 531, and the sixth section of the act of 1807, April 4, P. L. 133, 4 Sm. L. 393 (repealed 1860, March 31, P. L. 427, Sec. 79). These laws punish negligent escapes suffered by jailers, with fines, and make escapes by prisoners sentenced to hard labor punishable with such additional hard labor and corporal punishment, not extending to life or limb, as the court before whom such escaped prisoner shall have been convicted, shall adjudge and direct; a discretion in the application of punishment certainly sufficiently liberal." (Report on the Penal Code, 12, 13.)

It must be remembered that that very discretion permitted the trial judge is designed, and properly so, to prevent the injustice which the petitioner fears may result from the application of the Pennsylvania Act.. It may be assumed, for the purpose of this argument, that there are two prisoners, one serving a twenty year term for some form of homicide, and the other serving a five year term for a larceny conviction. Let it be supposed that the twenty year convict has a record of one offense, namely, the homicide committed in a fit of passion. The five year convict is a hardened criminal. By constant irritation, the five year convict persuades the other to join him in an escape plot. In such case, the Pennsylvania Statute permits the Judge trying the escape charge to take into account the circumstances surrounding the commission of the offense both are charged with; that the twenty year convict in reality was but the Trilby of the five year con-

vict Svengali. He may in the exercise of sound judicial discretion thereupon impose a maximum of five years upon the instigator of the escape plot and as little as one day upon the other, the twenty year convict. It is no answer to this to point out that in most of the cases in which the trial courts have imposed sentences for the offense of escape that the maximum term has been invoked as the punishment. It must be assumed that the circumstances were such as to warrant the imposition of the maximum term in sentencing the escaping prisoners.

Some effort is made by counsel for the petitioner to demonstrate that there is something unusual about the Pennsylvania Statute. It is, of course, elementary and so conceded by counsel for the petitioner that the fact that a statute is unique does not render it unconstitutional. That necessarily destroys any possible efficacy of his argument. Nevertheless, it may be pointed out that the analysis in the petitioner's brief is not accurate. In the first place, on page twenty-two of the petitioner's brief it is stated that Indiana has a statute substantially the same as that under attack here. Moreover, from the rest of the data submitted by counsel for the petitioner, we draw conclusions differing greatly from those advanced by him. Counsel for the petitioner states that while some of the statutes make the punishment light, and others make it heavy, *all* make it certain. An examination of the summary of state laws pertaining to escape submitted in the brief for petitioner shows that at least twenty-five do not provide for definite terms, but supply in some cases only a maximum term and in others a maximum and a minimum. In all of these the sentence is anything but certain. Thus in New Mexico, an escaped convict may be sentenced to not less than twenty-five years nor more than fifty years; and in Nevada, the offense is made a misdemeanor with no definite sentence specified. What is perhaps more important is that an examination of the

statutes listed by counsel for the petitioner discloses that in at least a dozen, the character of the offense of escape and the punishment therefor imposed depends upon circumstances other than the bare physical fact of escape. Thus, in four States, namely, Arkansas, Connecticut, Missouri and Wisconsin, the punishment depends upon the place from which the prisoner escaped. (The penitentiary or state prison or county jail, etc.); and in seven others, namely, Arizona, Idaho, Maine, Minnesota, New York, North Dakota and Washington, the punishment depends upon whether the escaping prisoner had been incarcerated for the commission of a felony or a misdemeanor. Thus, in all eleven, the punishment to be imposed for the offense of escape depends upon some fact such as the nature of the place of confinement or the label that might be attached to any one of the multitude of offenses from the punishment for which the prisoner has escaped. And as already has been pointed out, in Indiana, the Judge may sentence the escape offender to a term not exceeding the original term. From the foregoing, it would seem that if there is anything peculiar about the Pennsylvania Statute its uniquity lies in the fact that it is peculiarly well adapted to deal with a most difficult problem in the administration of criminal justice.

In taking into account the nature of the punishment in sufferance of which the escaping prisoner was incarcerated, the Pennsylvania Statute has followed the long practice of the common law. (See 2 Bishop Criminal Law, 9th edition, 1923), 1076; see also IN RE: FINLEY, 1 Cal. App. 198, 208, 81 Pac. 1041, 1045 (1905). Moreover, it is significant that in all the years it has been on the Pennsylvania Statute Books, its constitutionality has never been doubted. Indeed, it seems to have been assumed in at least one Pennsylvania appellate court decision. See COMMONWEALTH *v.* ADAMS, 3 Pa. Super. 167 (1896); cf EX PARTE CLIFFORD, 29 Ind. 106 (1867). While not conclusive, these facts are strong evidence

of the reasonableness of the classification and of the constitutionality of the statute. "Not lightly vacated is the verdict of quiescent years": Cardozo, C. J. in COLER *v.* CORN EXCHANGE BANK, 250 N. Y. 136, 141, 164 N. E. 882, 884 and cf. OWENBEY *v.* MORGAN, 256 U. S. 94 (1921); see COMMENT, (1930) 30 Col. L. Rev. 1059.

CONCLUSION

The judgment of the Pennsylvania Supreme Court holding the statute constitutional should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 25

COMMONWEALTH OF PENNSYLVANIA, *ex rel.*
ELMER SULLIVAN, Petitioner,

v.

STANLEY ASHE, Warden, State Penitentiary,
Western District of Pennsylvania, Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA.

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INDEX.

PAGE

Opinion of the Court Below 1
Jurisdiction 1
Statute Involved 2
Argument:
I. The Statute in fixing the maximum sentence for escape to be a period of time not exceeding the original period for which the prisoner was sentenced does not make an unreasonable classification 3
II. Cases relied on by Petitioner..... 7
III. The practical application of the present statute is of no moment in determining the question of its constitutionality..... 9
IV. Escape laws of other states, if not adjudicated as to constitutionality by the Supreme Court of the United States, are not pertinent to any of the issues raised by this appeal.... 10
Conclusion 11

Table of Cases.

Collins v. Johnston, Warden of the California State Prison, 237 U. S. 502 .....3, 4, 10
Graham v. West Virginia, 224 U. S. 616.....3, 7, 8
In re Mallon, 16 Idaho 743.....4, 7, 8
Leeper v. Texas, 139 U. S. 462.....4, 7
Missouri v. Lewis, 101 U. S. 22..... 9
Moore v. Missouri, 159 U. S. 673.....3, 4, 6
Pace v. Alabama, 106 U. S. 583 .....4, 7
State v. Johnsey, 287 Pac. 729 8
State v. Lewin; 53 Kan. 679 .....7, 8

Statute Cited.

Pennsylvania Act of 1860, March 31, P. L. 382, Sec. 3 2

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BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA.

OPINION OF THE COURT BELOW.

The opinion of the Court below (r. 22) is reported in volume 325 of the Pennsylvania State Reports, page 305.

JURISDICTION.

This petition involves the validity of a statute of the Commonwealth of Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the

United States. The Supreme Court of Pennsylvania dismissed a petition for a writ of habeas corpus, (r. 26), which alleged that petitioner was illegally confined and restrained of his liberty in the Western Penitentiary of Pennsylvania, (r. 2).

The Court below specifically passed upon the constitutional question, (r. 22, 26), as to whether or not the Pennsylvania Act of 1860, March 31, P. L. 382, Section 3, under which the petitioner was sentenced, violated the constitution provision above mentioned.

The petitioner is now confined in the Western Penitentiary of Pennsylvania by virtue of his sentence under the Pennsylvania Act complained of.

STATUTE INVOLVED.

The Act of Assembly (1860, March 31, P. L. 382, Section 3) complained of in this action reads as follows:

> **"Escape or Rescue of Prisoners—Escape and Breaking Prison.** If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such persons shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no

escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him."

ARGUMENT.

I.

The statute in fixing the maximum sentence for escape to be a period of time not exceeding the original period for which the prisoner was sentenced does not make an unreasonable classification.

It is a universally recognized principle that the background of an offender is an important factor in the determination of the gravity of his offense and the sentence to be imposed. This is recognized in habitual criminal statutes which have been held not to be in violation of the Fourteenth Amendment to the Constitution: *Graham v. West Virginia,* 224 U. S. 616; *Moore v. Missouri,* 159 U. S. 673. The statute in question contemplates the background of the offender and permits it, in the discretion of the sentencing judge, to be made a factor in arriving at a just sentence. The legislature of Pennsylvania, when it enacted the statute, was entirely within its power. The comparative gravity of criminal offenses and whether their consequences are more or less injurious, are matters for the State itself to determine: *Collins v. Johnston, Warden of the California State Prison,* 237 U. S. 502, 510. The Petitioner quarrels with the reasoning be-

hind the passage of the act and gives examples to show that the legislature was not correct in assuming that one serving a heavier sentence is potentially a greater danger to society than one serving a lighter sentence. In this he makes his own, individual judgment superior to that of the legislature to which the people in their sovereign capacity have delegated the law-making power. This reasoning, if not specious, would apply to any sentence meted out to any prisoner. One sentenced to ten years for robbery might well advance the same argument and successfully maintain that, in his opinion, robbery is not so serious as involuntary manslaughter which carries with it a maximum sentence of three years. The legislature deemed it the graver offense to escape from a long sentence than from a short one. In this it was acting according to its rights: *Collins v. Johnston, Warden of the California State Prison, supra.*

The escaping convict, by his act of breaking prison, places himself at once in the same category with all other escaping convicts serving like sentences. He cannot receive a greater sentence than other convicted prison breakers who were originally sentenced to serve an equivalent term of imprisonment. Where punishment is dealt out to all alike who are similarly situated, there is no violation of the Fourteenth Amendment: *Moore v. Missouri,* 159 U. S. 673; *Pace v. Alabama,* 106 U. S. 583; *Leeper v. Texas,* 139 U. S. 462.

The argument advanced by Petitioner (which he supports by citation of *In re Mallon,* 16 Idaho, 743, 744, 745) that the statute makes the escape from prison the offense and not the escape from the punishment of

such imprisonment and is therefore unreasonable cannot be sustained by logic. The fact of imprisonment for crime must, of necessity, connote the fact of punishment. Thus, one who escapes from prison automatically escapes from the penalty attendant upon his confinement. One does not escape from prison merely because it is a structure bearing that name but because of the fact of confinement within the prison. It is the loss of liberty which impels a convict to seek escape. To hold that the legislature of Pennsylvania must specifically indicate that the penalty to be inflicted for prison breach is because of the punishment behind the imprisonment is to require that it specifically indicate something that is obviously within the intention of the act itself.

If the act were to fix the outside limit at one hundred years instead of basing it upon the original sentence there could be no argument advanced that there was an unreasonable classification for the reason that all would be subject to the same penalty. Nor could the same argument apply if the legislature had enumerated every offense known to the law of Pennsylvania and then specified that the maximum penalty for each offense should be the maximum sentence for escaping imprisonment for such offense. In either event the escaping convict would be subjected to the likelihood of having a much more severe punishment inflicted than could be imposed under the present act. We know of no Pennsylvania act which imposes a penalty of one hundred years, and it is generally conceded that the maximum penalty for crime is seldom inflicted unless the offender be an habitual one or hardened to a large degree. Thus, if either of the possible acts

above mentioned were in force at the time Petitioner escaped he would have been faced with the possibility of a much larger penalty than the one which was actually imposed. He was originally confined for the crime of Breaking and Entering a Store Building with intent to Commit a Felony; a crime which has a maximum penalty of ten years. In the first of the supposed acts of assembly discussed above he could have, upon escape and recapture, been sentenced to anything up to one hundred years; in the second, he could have been sentenced to ten years. Either sentence (which would have been as the acts make no unreasonable classification) might conceivably be far greater than the one he received under the act in question. It cannot, therefore, be said that it is unreasonable.

It is complained that the act requires the imprisonment for escape to be "of the like nature" as the original imprisonment. Here again the legislature was acting within its power in determining the comparative gravity of offenses. A hardened criminal confined at hard labor could not, as a matter of common sense, expect to receive a simple imprisonment sentence for attempting to escape. The obvious purpose of the act was to discourage prison breach. If a convict finds his confinement so onerous as to tempt him to flee, his caution will urge him to pause and hesitate if he can be assured that any future penalty will be of like nature and kind as the one at present inflicted. It is submitted that the effect of the act would be destroyed or at least modified if the escaping convict had hopes of changing the nature of his punishment. In this phase of the act we find nothing contrary to the rule laid down in *Moore v. Missouri*, 159 U. S. 673;

Pace v. Alabama, 106 U. S. 583 and *Leeper v. Texas,* 139 U. S. 462 as recited above. The punishment is here inflicted on all alike who are similarly situated. Hence, there is no violation of the Fourteenth Amendment.

In brief the contention of the Commonwealth of Pennsylvania may be summarized as follows: The comparative gravity of criminal offenses is for the State itself to determine. In using a previous sentence for crime as a yardstick to measure the maximum sentence for escaping prison, the State is within its power. "They (old offenders) are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted": *Graham v. West Virginia,* 224 U. S. 616, 623. As the Petitioner aptly puts it in his brief (p. 7): "The sentence for the second offense is made dependent upon the fact, easily ascertainable, of a prior conviction, and so the classification applies to all second offenders alike and is reasonable." Here the fact of a previous imprisonment and its duration is easily ascertainable. The classification extends to all convicts serving periods of time of like character. Hence, the classification is reasonable.

II.

Cases relied on by Petitioner.

It is important for purposes of this case to differentiate the cases cited by Petitioner in support of his contentions. *In re Mallon,* 16 Idaho 737 and *State v. Lewin,* 53 Kan. 679, are cases based upon statutes which make the sentence for escape mandatory. The

essential element of the statute in question here is the discretionary power vested in the sentencing judge. The act merely instructs the conscience of the court relative to the past criminal activities of the escaped convict and names a maximum term as the determining limit beyond which the court must not go. In other words, the original sentence imposed upon the convict becomes a factor merely in the determination of the sentence; it is not the sole guide upon which the court must rely. It is conceivable that this feature of the act was inserted therein purposely to cover a situation such as the one imagined by the Petitioner (Brief p. 8) wherein the convict, without *mens rea,* is guilty of a technical breach of prison.

The other case recited by Petitioner, *i. e. State v. Johnsey,* 287 Pac. 729, is more nearly in point with the case at issue here. We agree that the result of said case is contrary to our views but point out that two of the authorities relied upon by the Court in that case are *In re Mallon* and *State v. Lewin,* the two cases which we have already distinguished from the one at bar. We also disagree with the reasoning of the Court in that it assumes that the original sentence is a matter entirely disconnected with the crime of escape. It is no more disconnected than is an original offense in an habitual criminal case. Robbery B, if committed by the same man who has already been convicted of Robbery A, is aggravated by the fact of the previous conviction. This we have seen, when applied in an habitual criminal statute, is not repugnant to the Federal Constitution. "The fact of such [prior] sentence, indicating the gravity of the offense, affords a reasonable basis for classification": *Graham v. West Virginia,* 224 U. S. 616, 630. In all habitual criminal stat-

utes the probability arises that the subsequent conviction is not factually connected with former offenses. The relationship between the two rests in the recidivistic qualities of the offender himself. Thus, it is error to affirm that there is no connection between the two convictions.

III.

The practical application of the present statute is of no moment in determining the question of its constitutionality.

Evidence of the uniform imposition of the maximum sentence under the statute in question as shown by Petitioner's brief (pages 14 to 20) is not proof of the denial of equal protection of the laws as guaranteed by the Federal Constitution. Before he can show that he was denied equal protection of the laws, the Petitioner must establish the fact that he was subjected to a greater penalty under the Act than were other prisoners under like circumstances and conditions: *Missouri v. Lewis,* 101 U. S. 22. This rests in the body of the statute itself and not in the practical application of it. There is no contention that the sentencing judge exceeded the limit fixed by the law-making power, *i. e.* the legislature. If the sentencing judge has followed a course of conduct within the contemplation of the law, the Petitioner's quarrel is with the judge himself and not with the act of assembly which informs his conscience merely and dictates the extreme limit beyond which he must not go in imposing sentence. Any constitutional argument against a statute must, of course, be valid at all times during the life of said statute. The present argument advanced by Petitioner could not have been invoked by the first convict to be

sentenced agreeably to the law. He would have had to confine himself to defects in the law itself and could not have referred to a course of conduct which was not yet then in operation. We conceive that the Petitioner must show that the act in question is, not only now but always was, unconstitutional without recourse to evidentiary material relating only to the practical application of it.

IV.

Escape laws of other states, if not adjudicated as to constitutionality by the Supreme Court of the United States, are not pertinent to any of the issues raised by this appeal.

Each Sovereign State has the exclusive function of describing the punishment to be inflicted in particular cases within its boundaries: *Collins v. Johnston, Warden of the California State Prison,* 237 U. S. 502, 510. How each State reacts to the problem at hand has no direct bearing upon the constitutional question raised by this appeal. Admittedly, there are differing views upon the same problem. The action taken by the legislatures of forty-odd different states, not acting in concert or in unison, could scarcely be expected to achieve exactly the same result. Had they done so, the astonishing result would have been little short of miraculous. Despite Petitioner's allegation to the contrary (brief p. 24) it will be seen (petitioner's brief p. 22) that at least one state (Indiana) has adopted the Pennsylvania view. Where two states out of a possible forty-eight achieve the same conclusion in a matter dealing with criminal penalties, and where a wide divergence of opinion is bound to exist, the conclusion

is readily reached that the adopted penalty must closely approximate the heinousness of the crime. But, as the situation really exists, more than two states reached the same conclusion. The three jurisdictions represented by the cases cited by Petitioner indicate a still more surprising unanimity of mind among the state legislatures. True, two of these acts differ in respect to the discretion allowed to the sentencing judge but the aims and objects of the statutes were undoubtedly in accord with those of the Pennsylvania Legislature. Thus, we can safely say that five states have agreed upon this method of punishment as being reasonably in agreement with the gravity of the offense. The Petitioner, in attacking the reasonableness of the act, substitutes, in effect, his personal judgment for that of five State Assemblys acting independent of each other. The absurdity of his contention is manifest.

CONCLUSION.

The judgment below should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1937.

Commonwealth of Pennsylvania, ex rel. Elmer Sullivan, Petitioner,
vs.
Stanley Ashe, Warden, State Penitentiary, Western District of Pennsylvania.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

[November 8, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

The question presented in this case is whether, consistently with the equal protection clause, a State may classify punishments to be imposed on convicts breaking out of the penitentiary by authorizing the court to imprison each for a period not exceeding his original sentence.

September 21, 1936, petitioner, asserting that he was illegally committed to the Western Penitentiary of Pennsylvania to serve a sentence for the crime of breaking out of that prison, applied to the highest court of the State for a writ of habeas corpus. The court granted a rule to show cause and, after hearing counsel for the parties, held petitioner lawfully sentenced and discharged the rule. 325 Pa. St. 305. The petition for writ of certiorari asserts that this decision conflicts with *State* v. *Lewin*, 53 Kan. 679, *In re Mallon*, 16 Idaho 737, and *State* v. *Johnsey*, 46 Okla. Cr. App. 233. The statutes condemned in the Kansas and Idaho cases differ essentially from the Pennsylvania statute upheld in this case. Finding conflict between the decision below and that in the Oklahoma case, we granted the writ. Judicial Code, § 237 (b); 28 U. S. C., § 344 (b). 301 U. S. —.

The challenged provision, found in the Act of March 31, 1860, P. L. 382, declares (§ 3) that "if any prisoner imprisoned in any penitentiary . . . upon a conviction for a criminal offense . . . shall break such penitentiary . . . such person shall

be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped . . . ."

In 1929, petitioner pleaded guilty of the crimes of burglary and larceny and was sentenced to the Western Penitentiary for a term of from three to six years. In December, 1931, he broke out, and, after capture and conviction, was sentenced to imprisonment for a term of the same length as, and to commence at the expiration of, the original sentence.

To illustrate the inequalities between sentences permissible under the challenged provision, petitioner emphasizes the fact that, if two or more convicts escape together under the same circumstances, they may be sentenced for different terms. In fact, the record shows that petitioner escaped simultaneously with one McCann and that upon conviction for the same crime the latter was sentenced to serve a term equal to his original sentence, from one to two years.

But the fact that terms of imprisonment may differ as do original sentences does not warrant condemnation of the statute. The law has long recognized a relation between punishment for breach of prison and the offense for which the prisoner is held, and it has more severely punished prison breaking by one undergoing imprisonment for grievous crime than if done by one held for a lesser offense. Prior to the statute *de frangentibus prisonam* of 1 Edw. II (1307) every prison breaking by the offender himself, whatever the crime for which he was committed, was a felony, punishable by "judgment of life or member." This severity was mitigated by the statute. It forbade that judgment unless the breaking was by one committed for a capital offense.[1] Breach and escape by one held for felony continued to be dealt with as felony; but, if committed by one confined for an inferior offense, was punishable

[1] "That none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."

as a high misdemeanor by fine and imprisonment.[2] In harmony with that idea a number of States deal with that offense more severely when committed by one imprisoned for a heinous offense or a long term.[3] Indeed, this Court has sustained classification for punishment of crimes by convicts upon the basis of the sentences being served at the time. In *Finley* v. *California,* 222 U. S. 28, it held that a statute prescribing the death penalty for the commission by life prisoners of assaults with intent to kill, lesser punishments being laid upon other convicts, was not repugnant to the equal protection clause.

The principle is similar to that under which punishment of like crimes may be made more severe if committed by ex-convicts. Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment. *Graham* v. *West Virginia,* 224 U. S. 616, 623. *McDonald* v. *Massachusetts,* 180 U. S. 311. *Moore* v. *Missouri,* 159 U. S. 673, 677. *Plumbly* v. *Commonwealth,* 2 Metc. 413, 415. *People* v. *Sickles,* 156 N. Y. 541, 547. Save as limited by constitutional provisions safeguarding individual rights, a State may choose means to protect itself and its people against criminal violation of its laws. The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for its determination. *Collins* v. *Johnston,* 237 U. S. 502, 510. *Howard* v. *Fleming,* 191 U. S. 126, 135-136. It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

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[2] See IV Blackstone, p. 130; I Hale's Pleas of the Crown, c. 54; II Hawkins' Pleas of the Crown, c. 18; II Wharton Criminal Law (12th ed.) § 2019. Rex *v.* Haswell, R. & R. 458. Commonwealth *v.* Miller, 2 Ashm. (Pa.) 61. Cf. Rex *v.* Fell, 1 Ld. Raym. 424; Kyle *v.* State, 10 Ala. 236; Commonwealth *v.* Homer, 5 Metc. 555, 558.

[3] Arizona, Revised Code 1928, § 4539. Connecticut, Gen. Stats. (1930 Revision) §§ 6173, 6175. Idaho, Code 1932, Title 17, §§ 803, 804. Indiana, Annotated Statutes, 1933, §10-1807. Maine, Revised Statutes, 1930, c. 133, § 16; c. 152, § 45. Minnesota, Mason's Statutes, 1927, § 10007. New York, Penal Law, § 1694. North Dakota, Compiled Laws 1913, § 9351. Washington, Remington's Revised Statutes, § 2342. Wisconsin, Statutes 1935, §§ 346.40, 346.45.

Presumably, the sentence being served at the time of prison breaking was determined upon due consideration of the pertinent facts. The judgment then pronounced is good evidence of the convict's natural or acquired bent of mind and his attitude toward the law and rights of others. The fact that he would and did break prison shows him still disposed to evil and determined to remain hostile to society. And that is sufficient to sustain the classification made by the Pennsylvania statute for punishment of prison breakers on the basis of their original sentences.

Affirmed.